91-356

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,
v.
B.E. TILLEY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 4044(d)(1)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1344 (d)(1)(A)) and Section 401(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. § 401(a)(2)), which permit an employer to recoup surplus pension plan assets at plan termination after satisfaction of all "liabilities," preclude such a reversion:

(a) when the surplus remaining after plan termination and the satisfaction of all liabilities was not the result of an actuary's "computational error," and

(b) when fully subsidized early retirement benefits were not paid to participants who failed to satisfy the age and service requirements under the plan for such benefits.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, The Mead Corporation, and the respondents, B.E. Tilley, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode. In addition, the Court of Appeals listed David H. Wall as a plaintiff-appellant in the caption to its decision. Mr. Wall, however, died on June 6, 1985, while this action was still pending before the district court. No attempt was made to substitute Mr. Wall's executor as a party until this case was pending before this Court in 1988, and this Court denied respondents' motion for substitution. 488 U.S. 906 (1988). No subsequent motion for substitution has been made, and in the body of its opinion, the court of appeals recognized that only five plaintiffs remained. App. 3a n.1.

Pursuant to Supreme Court Rule 29.1, the following list identifies all parent companies, subsidiaries (other than wholly-owned subsidiaries), and affiliates of petitioner, The Mead Corporation:

1. Aviocart S.P.A.
2. B.C. Chemicals Company
3. B.C. Chemicals Ltd.
4. Folio Corporation
5. Harima M.I.D., Inc.
6. International Fibre Sales, S.A.
7. Mead Emballage, SA
8. Mead Europe Engineering, SARL
9. Mead Packaging Ppty. Ltd.
10. Mead-Toppan Company Ltd.
11. Noranda Panelboard, Inc.
12. Northwood Forest Industries, Ltd.
13. Northwood Properties Limited
14. Northwood Pulp & Timber, Ltd.
15. Star Data Systems, Inc.

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Petitioner, The Mead Corporation ("Mead") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) on remand from the decision of this Court (App. 33a-47a) is reported at 927 F.2d 756. The court of appeals' initial decision (App. 48a-54a) is reported at 815 F.2d 989. The memorandum opinion of the district court (App. 55a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A timely petition for rehearing with a suggestion for rehearing en banc was denied by the court of appeals in a 6-5 vote on June 5, 1991, with

Judges Russell, Chapman, Wilkinson, Wilkins, and Niemeyer voting in favor of rehearing. App. 62a-63a.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent sections of the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1344), the Internal Revenue Code of 1986 (the "Code") (26 U.S.C. § 401(a)(2)), and the Internal Revenue Service regulations (Treas. Reg. § 1.401-2(b)), are set forth in the Appendix. App. 69a-74a.

STATEMENT

This petition presents a question that this Court characterized in its previous opinion in this case as "complicated and important," with a direct impact on "the private pensions of millions of workers" (App. 44a n.11) —namely, whether unearned, subsidized early retirement benefits are "liabilities" under ERISA and the Code that must be satisfied upon termination of a pension plan. In reversing the court of appeals' first decision in this case, this Court determined that respondents could not claim entitlement to these benefits under ERISA § 4044(a)(6), which the Court held was only an allocation mechanism. App. 43a.[2] Noting that "[t]he Plan did not provide for any benefits payable solely upon plan termination" (App. 36a), this Court nevertheless was reluctant to rule on the

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[1] The court of appeals initially issued an order denying rehearing and rehearing en banc and indicating that no member of the court or panel had requested a vote on Mead's suggestion for rehearing en banc. App. 64a-64a. This order was filed on May 28, 1991, but was withdrawn on May 30, 1991. App. 68a.

[2] For convenience, Title IV of ERISA, as amended, is referred to by citation to ERISA, without parallel citations to Title 29 of the U.S. Code. Similarly, the Internal Revenue Code is referred to without parallel citation to Title 26 of the U.S. Code.

remaining two questions briefed by the parties without the views of the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service ("IRS"), the agencies responsible for administering ERISA and the Code. App. 44a n.11. Accordingly, the Court remanded for consideration of two alternative grounds for recovery of unearned early retirement subsidies: (1) whether such benefits are "accrued benefits" under ERISA, and (2) whether they are "liabilities" within the meaning of ERISA § 4044(d)(1)(A) that must be paid on plan termination. App. 48a.

On remand the IRS and the PBGC each informed the court of appeals that the benefits at issue here were neither "accrued benefits" nor "liabilities" of the plan. The court of appeals unanimously ruled that unearned early retirement subsidies were not accrued benefits under ERISA. App. 6a-9a. In a sharply divided decision, however, the court below held that unearned early retirement subsidies were liabilities that Mead was required to pay on plan termination. App. 12a. In its opinion the court of appeals merely acknowledged that it had received the views of the PBGC and completely ignored those of the IRS.

1. Beginning in 1938 the Internal Revenue Code ("Code") has required pension plans to include certain provisions in order to be "tax-qualified" and receive tax exempt status. The first such provision prevents diversion of pension plan assets—at plan termination or any other time—for any purpose other than for the exclusive benefit of participating employees. Code § 401(a)(2). To satisfy this non-diversion requirement, the terms of the plan must make it "impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries . . . for any part of the corpus or income to be . . . used for, or diverted to, purposes other than the exclusive benefit of [the] employees or their beneficiaries." *Id.*

Congress not only left this non-diversion requirement of the Code undisturbed when it enacted ERISA in 1974, but actually incorporated it into Title IV of ERISA by requiring that all "liabilities" of the plan be satisfied before any surplus plan assets can revert to the employer. ERISA § 4044(d)(1). Title IV also establishes a plan termination insurance program "to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 n.1 (1980). Finally, Title IV creates the PBGC to oversee plan terminations, and establishes a mandatory six-category allocation scheme for the distribution of assets upon plan termination. ERISA § 4044; *see* App. 35a n.2.

The "benefit liabilities" that a plan must pay on termination under Title IV of ERISA are, by definition, the same "liabilities" covered by § 401(a)(2) of the Code. *See* ERISA §§ 4001(a)(16), 4041(b)(1)(D). While the Code itself does not further define the term, agency interpretations delineate two requirements that must be met before "liabilities" are deemed satisfied. First, an IRS regulation explains that the requirement that "liabilities" be satisfied at termination is intended "to permit the employer . . . to recover at the termination of the trust . . . any balance remaining in the trust which is due to erroneous actuarial computations." Treas. Reg. § 1.401-2(b)(1). The phrase "erroneous actuarial computations" is defined in the regulation to mean "the surplus arising because actual requirements differ from expected requirements" (*id.*), which in turn means simply any funds remaining in the plan after satisfaction of all liabilities. *See* Rev. Rul. 83-52, 1983-1 C.B. 87 (reprinted at App. 74a-76a). Second the IRS regulation goes on to specify that the term "liabilities" includes both "fixed" and "contingent" liabilities. Treas. Reg. § 1.401-2(b)(2). In a series of revenue rulings, the IRS has defined "contingent liabilities" as the "benefit credits accrued up to the time

of termination." *E.g.*, Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69.[3]

2. The five respondents were salaried employees at the Lynchburg Foundry Company (the "Foundry") while it was a wholly-owned subsidiary of Mead. App. 3a, 36a. Each respondent participated in Mead's Industrial Products Salaried Retirement Plan (the "Plan"), a tax-qualified, defined benefit pension plan funded entirely by Mead. App., 3a, 36a.

In 1983 Mead sold the Foundry and, exercising a right it had expressly reserved (App. 119a (Plan, Art. XIII, § 4(a)), terminated the Plan. App. 37a. Pursuant to the terms of the Plan, participants earned a normal retirement benefit, payable at age 65 and calculated by reference to their earnings and years of service with Mead. App. 36a; App. 93a (Plan, Art. V, § 1). At termination of the Plan, participants who were age 55 or older were paid this age 65 benefit, reduced in accordance with the Plan's terms by 5 percent for each year that they were under age 65; those age 62 or older with 30 or more years of service were paid a fully subsidized early retirement benefit—*i.e.*, a benefit equal in amount to the benefit otherwise payable at age 65; and those ineligible for either of these early retirement benefits were paid only the earned—*i.e.*, "accrued"—portion of their age 65 normal retirement benefit. App. 36a-37a; App. 49a-50a. Respondents were all between 55 and 62 and thus fell into the first group. Pursuant to their elections, respondents were paid their reduced early retirement benefits in lump sums. App. 37a n.6.

Mead sought approval of the Plan termination from both the PBGC and the Internal Revenue Service ("IRS").

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[3] *Accord*, Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274 (same); Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138 (same); Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79 (same); Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110 (same); *see also* Treas. Reg. § 1.401-2(b)(2). The same result obtains under PBGC regulations. *See infra* n.7, p. 22.

App. 37a n.5. In November 1983 the PBGC issued a "notice of sufficiency," ruling that, based on Mead's planned distributions, all liabilities under the Plan had been satisfied. App. 157a-158a; *see* App. 37a n.5. The IRS subsequently issued a favorable "determination letter," similarly ruling that all liabilities to Plan participants had been satisfied. App. 159a-160a; *see* App. 37a n.5.

After the Plan assets were distributed to participants in the manner approved by the PBGC and the IRS, nearly $11 million remained. Under the terms of the Plan:

> Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan . . . , and after distribution of any released reserves . . . shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead].

App. 122a (Art. XIII, § 4(f)); *see* ERISA § 4044(d)(1)(A); Code § 401(a)(2); Treas. Reg. § 1.401-2(b). Accordingly, Mead took a reversion of the entire surplus. App. 37a.

3. In June 1984, however, respondents filed suit against Mead in state court, alleging, *inter alia*, that Mead's taking of the reversion without paying them unreduced early retirement benefits violated ERISA. App. 38a. Mead removed the suit to federal district court. App. 38a.

On cross-motions for summary judgment, the district court ruled in Mead's favor, holding that "early retirement benefits are not 'accrued benefits' under ERISA," and that "reaching age 62 and having thirty years of Credited Service [are] conditions which must be met before a participant [can] be said to possess even a contingent benefit of early retirement." App. 56a-57a. In addition, the district court held that, under ERISA § 4044(d)(1), the surplus properly reverted to Mead since "[a]pplying the broad IRS definition [of actuarial error] in this case . . . the surplus did in fact arise from actuarial error." App. 59a (footnote omitted).

On appeal the court of appeals reversed and remanded. App. 48a-54a. Under that court's initial view, Mead was obliged under ERISA § 4044(a)(6), which requires payment of "all other benefits under the plan," to pay early retirement subsidies "even if those benefits were not accrued at the time of [plan] termination." App. 52a.[4]

This Court reversed and remanded. App. 33a-47a. The Court rejected the court of appeals' construction of ERISA § 4044(a)(6), holding that "the language of § 4044(a)(6)—'benefits *under the plan*'—can refer only to the allocation of benefits provided by the terms of the terminated plan." App. 40a (emphasis in original). Since respondents had failed to satisfy the Plan's age and service requirements for receipt of an unreduced early retirement benefit, they had not earned a "benefit under the plan." App. 39a-40a.

The Court noted, however, the "two alternative grounds" respondents offered "for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer." App. 43a; *see supra* pp. 2-3. In remanding the case "for a determination whether respondents are entitled to damages on the basis of either of these alternative theories," this Court noted that neither the PBGC nor the IRS had briefed these questions, and specifically directed the court of appeals on remand to "consider the views" of both agencies, App. 43a-44a & n.11. As the Court observed, "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" App. 43a-44a (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

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[4] Within three weeks of the court of appeals' first decision in favor of respondents, their counsel filed a follow-on class action seeking early retirement subsidies for other participants in the Mead Plan without regard to whether they had satisfied the Plan's age and years of service requirements for receipt of those benefits. *See Linkous v. Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987). That suit is still pending.

Justice Stevens dissented. App. 45a-47a. He agreed with the majority's construction of ERISA § 4044(a)(6). App. 45a. In his view, however, Article XIII, § 4(f) of the Plan, ERISA § 4044(d)(1)(A), the "parallel provision" of the Code—*i.e.*, Code § 401(a)(2)—and the regulatory definition of "liabilities" in Treas. Reg. § 1.401-2(b)(2), required that unreduced early retirement benefits be paid to the respondents who had satisfied the Plan's 30 years of service requirement, but not until they also had satisfied the age 62 requirement. App. 45a-46a.

4. On remand the parties briefed the two statutory issues identified by this Court. Although the court of appeals did not invite the agencies to participate, the views of the PBGC and the IRS were presented on remand, as this Court had instructed. The PBGC filed a brief and participated in the oral argument, stating its view that "[u]nearned subsidized early retirement benefits are not among the liabilities included in Section 4044(d)(1)(A) that must be paid before residual assets revert to the employer." PBGC Br. on Remand at 4. The IRS participated by way of a letter from the Tax Division of the Department of Justice, which confirmed "the position of the Internal Revenue Service that . . . early retirement benefits [a]re not plan liabilities within the meaning of Section 401(a)(2) of the Code." App. 168a.[5]

Notwithstanding these agency positions, on remand a divided panel of the court of appeals ruled once again that Mead must pay unreduced early retirement benefits, even though the Plan's age and service requirements for receipt of those benefits have not been satisfied. App. 9a-16a. After unanimously ruling that unreduced early retirement benefits are not "accrued benefits" under ERISA (App. 6a-9a), the court of appeals turned to the "liabilities" issue and ruled that the reversion provision of the

[5] Under ERISA § 4002(b)(1), the PBGC has independent litigating authority. The Department of Justice letter required the approval of the Solicitor General. *See* 28 C.F.R. §§ 0.20(b), (c).

Plan, when construed in light of IRS regulations and as enforced by ERISA, required payment of unreduced early retirement benefits. App. 11a-16a.

In reaching this conclusion, the court of appeals reiled on its own peculiar understanding of two critical phrases in the Plan's reversion provision: "actuarial error" and "contingent rights accrued under the plan." App. 12a-15a. "Actuarial error," in the Court's view, "seems to reference computational error resulting from inaccurate statistical assumptions." App. 12a. "Contingent rights accrued," in the view of the court below, seemed to refer to benefits that respondents had expected to earn at some point in the future under the terms of the Plan. App. 13a-14a. Since it found no evidence of computational error in this case, and since the early retirement benefits at issue might have been earned had the Plan not terminated, the court of appeals held that a reversion could not properly occur without payment of unreduced early retirement benefits. App. 12a.

Judge Chapman dissented. App. 16a-32a. He criticized the majority for evading the mandate of this Court, for analyzing the Plan "in a vacuum," and for ignoring the "ample meaning" that both "actuarial error" and "contingent rights accrued" have "under both ERISA and the Code." App. 30a-31a. Judge Chapman first pointed out that subsection (1) of Treas. Reg. § 1.401-2(b) defines "liabilities" with reference to "erroneous actuarial computations." App. 30a. Embracing the IRS's view that " 'erroneous actuarial computations' is simply short-hand for what is left over after all vested and contingent obligations . . . are satisfied," Judge Chapman concluded that the surplus in the Plan was attributable to "erroneous actuarial computations" and therefore could properly revert to Mead. App. 24a, 30a. Second, Judge Chapman noted that subsection (2) of the regulation, along with IRS revenue rulings on the subject, made it clear that "contingent liabilities" are only those " 'benefit cred-

its *accrued* up to the time of termination of the trust.' " App. 21a (emphasis in original; quoting Rev. Rul. 53-33, 1953-1 C.B. 267, 273). Accordingly, Judge Chapman concluded that the term " 'liabilities' under the Code and ERISA does not include unaccrued benefits such as unreduced early retirement benefits." App. 22a.

5. On March 12, 1991, Mead filed a timely petition for rehearing with a suggestion for rehearing en banc. The PBGC, and the American Academy of Actuaries ("AAA") and the American Society of Pension Actuaries ("ASPA"), filed amicus briefs in support of Mead's petition. In its brief the PBGC reiterated its position that unreduced early retirement benefits are not "liabilities" of the plan, and noted that the panel majority's "construction of terms of art used in the Plan does violence to the established meaning of those terms under the Code and ERISA." PBGC Br. In Support of Rehearing at 8, 11 (reprinted at App. 186a-187a, 189a). Similarly, in their joint brief, AAA and ASPA noted that "virtually all pension plans" incorporate the pension law concepts construed by the panel majority, and concluded that "the majority has again called into question the correct calculation of the benefits paid and the reversions permitted from thousands of plans containing early retirement subsidies." AAA/ASPA Br. In Support of Rehearing at 9, 13. In a 6-5 vote, the court of appeals denied Mead's petition on June 5, 1991, with Judges Russell, Chapman, Wilkinson, Wilkins, and Niemeyer voting in favor of rehearing en banc, and Chief Judge Ervin, along with Judges Widener, Hall, Phillips, Sprouse, and Murnaghan, voting against. App. 62a-63a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CREATES A DIRECT CONFLICT OVER THE PROPER CONSTRUCTION OF CRUCIAL PENSION LAW PROVISIONS INCORPORATED IN VIRTUALLY EVERY PENSION PLAN NATIONWIDE

As this Court recognized in its earlier decision, this case presents "complicated and important issues pertaining to the private pensions of millions of workers." App. 44a n.11. The Court specifically instructed the court of appeals to consider the views of the responsible administrative agencies. The court of appeals was presented directly with the agencies' views, but disregarded them. Instead, the court of appeals developed its own idiosyncratic construction of crucial federal pension law terms that are included in virtually all pension plans nationwide.

The court of appeals reached this result by purporting, at least in part, to avoid the issues that concerned this Court and instead to decide the case on a different ground —one neither presented by the remand order nor briefed by the parties. This new ground supposedly rests on the particular language of the Mead Plan, but that in fact is not and indeed cannot be the case. Because the only portions of the Mead Plan relied on by the court below directly incorporate common federal pension law provisions, construction of those terms necessarily involves interpretations of federal law—a fact that the court of appeals itself acknowledged. When confronted with virtually identical plan language, other courts of appeals have similarly acknowledged the issue as one of federal law, but, in contrast to the court below, have engaged in standard statutory analysis—consulting the text of ERISA and the Code, the legislative history of the relevant provisions, and the views of the PBGC and IRS—to arrive at the proper construction.

The interpretations of federal pension law embodied in the decision below conflict with the views of the responsible administrative agencies, the holdings of other courts of appeals, and the established understanding of those terms within the pension community. As the court of appeals acknowledged, the longstanding practice of the PBGC, the IRS, and the leading associations of pension actuaries is "*not* to treat unreduced early retirement benefits as liabilities that must be satisfied prior to asset reversion." App. 10a (emphasis in original). Nevertheless, the court of appeals reached precisely the opposite conclusion and ruled that Mead must pay such benefits. This holding has a significant impact; as the PBGC warned in urging rehearing below, the court of appeals has adopted a "construction of terms of art used in the Plan [that] does violence to the established meaning of those terms under the Code and ERISA." PBGC Br. In Support of Rehearing at 11 (App. 189a).

The conflicts created by the decision below cannot be allowed to stand. The court of appeals' decision calls thousands of prior plan terminations into question and erects a barrier to the reversion of surplus pension plan assets that undermines the policy of ERISA § 4044 (d)(1), which specifically allows reversion of surplus assets to employers.

Until and unless the decision below is reversed, it will stand as an invitation to participants to attack prior plan terminations in the hope of being paid benefits they had "expected" to receive but for which they had never satisfied specific plan requirements. Moreover, in addition to seeking recovery from employers who received distributions of surplus assets after getting approvals from the IRS and the PBGC, plan participants will be able to sue the PBGC under ERISA § 4003(f) for having "adversely affected" them by approving such reversions. To protect against a flood of litigation seeking to force the repayment of billions of dollars in reverted plan assets or pos-

sibly to impose additional liabilities on the PBGC, this Court should grant the petition and resolve the conflicts created by the decision below.

1. The Decision Below Rests On An Incorrect Construction Of Key Provisions Of Federal Pension Law

ERISA and the Code do not require employers to establish pension plans. If an employer chooses to do so, however, the Code requires that the plan contain specified provisions in order to receive favorable tax treatment. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-14 (1981). As a result, tax-qualified pension plans are drafted carefully to comply with the various requirements of the Code. The Mead Plan, for example, is expressly drafted to be consistent with "Section 401 of the Internal Revenue Code [and] . . . any other provisions of law or the rules and regulations of [the IRS] . . . with respect to [tax] qualification of the Plan." App. 125a (Plan, Art. XV, § 4). Indeed, under the Plan any provision deemed inconsistent with the Code or IRS regulations is to be "disregarded" and deemed "null and void." App. 125a (Plan, Art. XV, § 4).

Since at least 1953 the IRS has mandated that each plan "be a definite written program setting forth all provisions essential to qualification." Rev. Rul. 53-33, pt. 2(f), 1953-1 C.B. 267, 271. To do so, tax-qualified pension plans, such as the Mead Plan, incorporate the requirements imposed by ERISA and the Code as specific plan provisions.

Article XIII, § 4 of the Mead Plan—the section relied on by the court of appeals—is just such a provision. As required by the IRS, this section of the Plan incorporates and restates requirements imposed by ERISA § 4044 and Code § 401 and the relevant regulations under them.

For example, IRS regulations specify that a qualified plan must reflect a commitment to "a permanent as distinguished from a temporary program." Treas. Reg.

§ 1.401-1(b)(2); *see also* Rev. Rul. 69-421, pt. 2(h), 1969-2 C.B. 59, 63 (noting permanency requirement). This same regulation notes, however, that "the employer may reserve the right to change or terminate the plan." Treas. Reg. § 1.401-1(b)(2). Mead has explicitly incorporated these requirements into the Plan: subsection 4(a) of Article XIII expresses Mead's intent "to maintain th[e] Plan in force indefinitely," while "reserv[ing] the right to amend or discontinue the Plan." App. 119a (Plan, Art. XIII, § 4(a)).

Similarly, subsections 4(c) and 4(d) of Article XIII of the Plan directly incorporate the requirements of ERISA § 4044. As this Court recognized in its previous decision (App. 39a-43a), § 4044(a) sets forth an "allocation scheme" for voluntary plan terminations. Subsection 4(c) of Article XIII of the Mead Plan does the same thing. *Compare* ERISA § 4044(a)(1)-(6), *with* App. 119a-121a (Plan, Art. XIII, § 4(c)(i)-(v)). ERISA § 4044(b) provides several specific rules to guide the allocation of assets among the categories listed in § 4044(a); subsection 4(d) of Article XIII of the Mead Plan restates these statutory requirements as guides for making allocations under subsection 4(c). *Compare* ERISA § 4044(b)(1)-(2), *with* App. 121a (Plan, Art. XIII, § 4(d)(i)-(ii)).

Subsection 4(f) of Article XIII of the Plan, which the court of appeals purported to construe, operates in the same way; it restates ERISA and Code requirements with respect to non-diversion of plan assets. Specifically, ERISA § 4044(d)(1)(A) prohibits any distribution of surplus assets until after "all liabilities of the plan to participants and their beneficiaries have been satisfied." Similarly, under Code § 401(a)(2), the terms of a plan must make it "impossible, at any time prior to the satisfaction of all liabilities" for plan assets to be "used for, or diverted to, purposes other than for the exclusive benefit of [the] employees or their beneficiaries." Code § 401

(a)(2). The IRS has explained that "the intent and purpose" of this non-diversion requirement "is to permit the employer to reserve the right to recover at the termination of the trust . . . any balance remaining in the trust which is due to erroneous actuarial computations." Treas. Reg. § 1.401-2(b)(1). In addition, the IRS has defined "liabilities" to include both "fixed liabilities"—*i.e.*, "the amounts required to provide the benefits payable to those who have become entitled to them"—and "contingent liabilities"—*i.e.*, "the benefit credits accrued up to the time of termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69; *see also supra* n.3.

Subsection 4(f) of Article XIII of the Mead Plan incorporates these regulatory provisions by mandating that any Plan surplus be attributable to "actuarial error" before it can revert to Mead, and by requiring that "benefit rights or contingent rights accrued under the Plan" be satisfied. App. 122a (Plan, Art. XIII, § 4(f)). The dissent below pointed out (App. 30a) that by including the "actuarial error" limitation on reversions, the Plan drafters were merely recognizing that the Code and applicable IRS regulations only permit reversion of a surplus caused by "erroneous actuarial computations," and writing that concept into the Plan. As the PBGC told the court of appeals, "[i]t is simply inconceivable that the drafters of the Mead Plan intended by that term anything other than the meaning attached to it by the IRS." PBGC Br. In Support of Rehearing 10 (footnote omitted) (App. 189a); *see also* Rev. Rul. 85-6, 1985-1 C.B. 133, 134 (using "actuarial error" phrasing); App. 30a (Chapman, J., dissenting) (noting IRS's "interchangeable use" of "erroneous actuarial computations" and "actuarial error").

Similarly, as even the court below acknowledged (App. 14a), the "contingent rights accrued" language was

"written in light of the regulation" that compels satisfaction of "contingent liabilities." *See* Treas. Reg. § 1.401-2(b)(2). The specific formulation used by the Plan drafters mirrors the definition of "contingent liabilities" adopted by the IRS in a series of revenue rulings: "benefit credits accrued up to the time of termination." Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69; *accord, e.g.*, Rev. Rul. 53-33, pt. 3(d) 1953-1 C.B. 267, 271; *see also supra* n.3.

Thus, the two phrases construed by the court of appeals are not idiosyncratic terms invented by the drafters of the Mead Plan. Rather, as other courts of appeals have recognized when confronted with identical plan language, they are federal pension law terms of art originating in, and defined by, the relevant statutory and regulatory provisions. *See, e.g., Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 (11th Cir. 1988) (en banc); *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984) (per curiam).[6]

In fact, the "actuarial error" and "contingent liabilities" concepts are incorporated into virtually every pension plan nationwide. As noted above, the two leading organizations of pension plan actuaries, who work with terminating pension plans on a daily basis, wrote in their amicus brief on rehearing in the court below that "virtually all pension plans" incorporate such provisions. *See* AAA/ASPA Br. In Support of Rehearing at 9. Similarly, in urging rehearing, the PBGC noted that these provisions

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[6] In light of "ERISA's broad[] purpose of ensuring uniform treatment of pension benefits throughout the country," *In re Moore*, 907 F.2d 1476, 1480 (4th Cir. 1990), courts typically construe plan provisions by reference to the ERISA and Code backdrop against which they were drafted. *See, e.g., Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987); *Chait v. Bernstein*, 835 F.2d 1017, 1023 (3d Cir. 1987); *Babb v. Olney Paint Co.*, 764 F.2d 240, 242 (4th Cir. 1985).

are "terms of art" with "established meaning . . . under the Code and ERISA." PBGC Br. In Support of Rehearing at 11 (App. 189a). In short, despite the court of appeals' lip service to the "terms of the Plan" (App. 11a), the decision below cannot fairly be characterized as resting only on plan language. Rather, it interprets basic federal pension law, and consequently, its pernicious effects will not be limited to the particular pension plan at issue in this case.

2. The Decision Below Conflicts With The Views Of The Responsible Administrative Agencies And Other Courts

The court of appeals' construction of these two ERISA and Code provisions incorporated in the Mead Plan is at odds with the views of the responsible administrative agencies, other courts of appeals, and the pension community as a whole. These direct conflicts over the proper interpretation of key provisions of federal pension law require review by this Court.

a. The decision below construes the Plan's reference to "actuarial error" to mean "a computational error resulting from inaccurate statistical assumptions." App. 12a. This misconstruction directly conflicts with the position of the responsible administrative agencies and other courts.

Both the PBGC and the IRS follow the longstanding regulatory definition of "actuarial error" as "the surplus arising because actual requirements differ from expected requirements." Treas. Reg. § 1.401-2(b)(1). IRS revenue rulings clarify that "actuarial error" need not involve any specific mistake in calculation, but rather is used simply to describe any surplus remaining after a plan has been terminated and its liabilities satisfied. The key revenue ruling spelling out the agency's definition, Revenue Ruling 83-52, provides that "[a]fter satisfaction of [fixed and contingent] liabilities, an employer may recover any remaining funds from the plan as sur-

plus resulting from actuarial error." Rev. Rul. 83-52, 1983-1 C.B. 87, 87 (App. 75a); *accord*, Rev. Rul. 85-6, 1985-1 C.B. 133, 134.[7] Thus, far from necessitating the type of "computational error" required by the decision below, the agencies use "actuarial error" as, in Judge Chapman's words, "short-hand for what is left over after all vested and contingent obligations created in the plan are satisfied." App. 24a.

Indeed, both the PBGC and the IRS applied this established definition of "actuarial error" to the termination of the Mead Plan and specifically authorized the reversion at issue in this case. The PBGC issued a "notice of sufficiency" approving Mead's proposed distribution of Plan assets—a distribution that explicitly included a reversion. *See* App. 157a-158a.[8] Similarly, the IRS sent Mead a favorable "determination letter," which constituted a ruling that "excess plan assets" may be returned to Mead. *See* App. 159a-160a. Notwithstanding this Court's admonition to "consider the views of the PBGC and the IRS" (App. 43a), the court of appeals rejected both the IRS's definition and the agencies' application of it to the facts of this case.

By contrast, when called upon to interpret the "actuarial error" concept incorporated in a tax-qualified pension plan, other courts of appeals have acknowledged the term's regulatory origin and construed it in light of the

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[7] PBGC regulations similarly provide that all "residual assets"—which are defined as "plan assets remaining after all liabilities . . . have been satisfied" (29 C.F.R. § 2618.2)—may revert to the employer. *See* 20 C.F.R. § 2618.30(a).

[8] The PBGC's notice of sufficiency expressly refers to information supplied by the Plan's administrator, which was provided to the PBGC and the IRS in an IRS Form 5310, the relevant portion of which was filed, with the court of appeals' approval (App. 66a-67a), as Exhibit C to Mead's reply memorandum in support of rehearing below. On that Form, the Plan administrator indicated that the Plan termination would involve a reversion.

established position of the agencies. As a result, there is a direct conflict among the courts of appeals.

In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (en banc), the Eleventh Circuit dealt with a plan provision that permitted reversion of any surplus existing "as a result of actuarial error." *Id.* at 1170. Noting that the plan "mirror[ed] the regulatory interpretation," the *Blessitt* court concluded that Treas. Reg. § 1.401-2 and the IRS revenue rulings set forth the appropriate definition of "actuarial error," and approved a reversion of assets even though no "computational error" of the type required by the decision below (App. 12a) had occurred. *See* 848 F.2d at 1170-71.

The Sixth Circuit followed precisely the same course in *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984). There, the pension plan authorized reversion of " 'any surplus attributable to actuarial error.' " *Id.* at 337 (quoting pension plan). Plan participants sought to prevent the employer from recouping "any remaining surplus funds" after termination of the plan. *Id.* at 336. Recognizing that "the definition of an 'actuarial error' is the real point upon which . . . entitlement [to the surplus] turns," the *Dyneer* court endorsed the "adopt[ion of] the Internal Revenue Service's most recent definition of an 'actuarial error.' " *Id.* at 337 (citing Rev. Rul. 83-52, 1983-1 C.B. 87). Accordingly, like the Eleventh Circuit, the Sixth Circuit approved a reversion to the employer even though no "computational error" had taken place. *Compare* App. 12a.[9]

The Courts of Appeals for the Third and the District of Columbia Circuits have similarly approved constructions of "actuarial error" that are consistent with the

[9] *See also Bryant v. International Fruit Prods. Co.*, 793 F.2d 118, 121 (6th Cir.) (adopting IRS definition of "actuarial error"), *cert. denied*, 479 U.S. 986 (1986).

agencies' position, but in conflict with the decision below. In both cases the courts of appeals affirmed without opinion decisions by district courts that allowed reversions without requiring that a "computational error" be made by an actuary. *See In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131-32 (E.D. Pa. 1977) (permitting reversion of any surplus due to "erroneous actuarial computations"), *aff'd*, 582 F.2d 1273 (3d Cir. 1978); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 261 (D.D.C. 1983) (same), *aff'd*, 729 F.2d 863 (D.C. Cir. 1984); *see also Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 983, 994 (D.N.J. 1991) (approving reversion of surplus assets in a plan with "erroneous actuarial computations" provision; citing Treas. Reg. § 1.401-2(b)(1)'s definition).[10]

b. The construction of "contingent liabilities" in the decision below creates an equally serious conflict. While the court below purported to rely on Treas. Reg. § 1.401-2(b)(2) to construe the Plan's incorporation of the "contingent liabilities" concept, it concluded that the Plan's language created a benefit upon plan termination: "[W]e think that Mead was obligated to pay the unreduced early retirement benefits because the Plan mandated the satisfaction of 'contingent rights accrued under the Plan.'" App. 13a.[11] In reaching this conclusion, the court of ap-

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[10] As AAA and ASPA noted in their brief in support of rehearing below, the court of appeals' interpretation of "actuarial error" is also inconsistent with the established understanding of that term within the pension community. *See* AAA/ASPA Br. In Support of Rehearing at 7-9; *see also* App. 10a (noting "actuarial profession's understadning of ERISA").

[11] The court of appeals' reasoning is circular, since it creates benefits out of language that refers only to benefits defined elsewhere in the plan. App. 13a. In addition, the court of appeals completely ignored the plan administrator's decision not to pay such benefits because the Plan's age and service conditions had not been met—a decision that should be granted deference under Article

peals brushed aside the views of the PBGC, the IRS, and the professional actuarial associations as though the Mead Plan had been written in a vacuum without reference to Code and ERISA rules. *See* App. 13a-15a. Inexplicably, the court of appeals read the IRS regulation with the benefit of only dictionary definitions of the word "contingent," and defined a "contingent liability" as any benefit that "the Plan was liable to pay . . . on a contingency." App. 13a.[12] This interpretation is completely at odds with the views of the PBGC, the IRS, and other federal courts, all of whom have recognized that a benefit becomes a plan "liability" only when the Plan's conditions for entitlement to it are satisfied.

The PBGC and the IRS have long construed Treas. Reg. § 1.401-2(b)(2) and the related provisions of ERISA and the Code—ERISA § 4044(d)(1)(A) and Code § 401(a)(2)—to exclude unearned benefits, including early retirement subsidies, from the "contingent liabilities" that must be satisfied on plan termination. Rather, the agencies' longstanding view is that "contingent liabilities" consist only of "the benefit credits accrued up to the time of termination." *See* Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274.[13] Since early retirement subsidies do not accrue

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XI, § 1(b)(ii) of the Plan (App. 111a), and under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (plan administrator's interpretation of the plan "will not be disturbed if reasonable").

[12] In turning only to the dictionary, the court below fell victim to "the not uncommon error of reading technical pension language as if it were ordinary English speech." *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977); *see also, e.g., Wise v. Ruffin*, 914 F.2d 570, 575 n.5 (4th Cir. 1990) (same), *cert. denied*, 111 S.Ct. 1090 (1991); *United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1297 (3d Cir. 1983) (same).

[13] *Accord*, Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138; Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79; Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110; Rev. Rul. 69-421, pt. 3(d), 1969-1 C.B. 59, 69; Rev. Rul. 71-152, 1971-1 C.B. 126, 127; *see also* 29 C.F.R. §§ 2618.2, 2618-13-.15 (PBGC regulations on allocation of plan assets).

on a year-to-year basis, but become entitlements all at once when the plan's requirements are satisfied, subsidies for which those requirements have not been met are not "contingent liabilities" of a terminated plan. *See, e.g.*, App. 94a (Plan, Art. V, § 2(b)) (receipt of unreduced early retirement benefits is conditioned on retiring after reaching age 62 and having 30 years of service).

Both agencies expressly informed the court below of their positions. In its brief on remand, the PBGC flatly stated that "[u]nearned subsidized early retirement benefits are not among the liabilities included in section 4044(d)(1)(A) that must be paid before residual assets revert to the employer." PBGC Br. on Remand at 4. The PBGC went on to explain that "since its inception" the agency has "construed the 'liabilities' that must be satisfied under section 4044(d)(1)(A) to be coextensive with the benefits included in the six priority categories in section 4044(a)"—which include only benefits for which participants have met the conditions for entitlement under the plan, whether or not vested. *Id.* at 6-8. Similarly, as the Department of Justice explained, the view of the IRS is that "early retirement benefits [a]re not plan liabilities within the meaning of Section 401(a)(2) of the Code." App. 168a. These agency positions are fully congruent because, under Title IV of ERISA, the "benefit liabilities" of a plan consist of "the benefits of employees and their beneficiaries under the plan (within the meaning of section 401(a)(2) of the Internal Revenue Code of 1986)." ERISA § 4001(a)(16); *see also* PBGC Br. In Support of Rehearing 8 (App. 187a). Ignoring these agency views, the court of appeals ruled that unearned early retirement subsidies were "contingent rights accrued" that had to be satisfied. Accordingly, there can be no doubt that the decision below squarely conflicts with the governing positions of the responsible administrative agencies.

The decision below also conflicts with the holdings of other appellate courts. The Eleventh Circuit in *Blessitt* reviewed the "regulatory interpretations" and concluded that "[c]ontingent liabilities have never been interpreted to include benefits that had not yet accrued when a plan terminated." 848 F.2d at 1170. Because it ruled (*id.* at 1171) that "unaccrued benefit expectancies" do not constitute "contingent liabilities" under Code § 401(a)(2), the *Blessitt* court directly rejected the court below's view that benefit expectations constitute "contingent liabilities" for purposes of ERISA and the Code. App. 13a-15a.

Following *Blessitt*, the Fifth Circuit also has rejected a broad reading of "contingent liabilities." In *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), the court "recognized that federal guidelines are clear that 'an employer must satisfy only the employees' *accrued* benefits under the plan—not benefits that would accrue in the future if the employees continued to work for the employer [or successor employer] after the plan terminates—before a reversion of residual assets is permitted.'" *Id.* at 1070 (quoting *Blessitt*, 848 F2.d at 1172; emphasis and alteration in original).

The Third Circuit has taken an identical approach. In *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (reprinted at App. 161a-166a), the court addressed the precise question at issue here. Placing heavy reliance on "the views espoused in the PBGC's amicus brief," the *Nobers* court held "that the employee's expectations of early retirement subsidies are not 'liabilities' within the meaning of § 4044(d)(1)(A)." App. 164a, 166a.

The purported attempt of the court below to sidestep the question remanded to it—whether unreduced early retirement subsidies constitute liabilities under ERISA § 4044(d)(1)—thus wholly fails. ERISA § 4044(d)(1)

liabilities are the same as "liabilities" under Code § 401 (a) (2),[14] so that, by holding (App. 14a) that the terms of the Mead Plan "conform to the plain meaning of the word 'contingent'" under the Code § 401(a)(2) regulation, the court of appeals necessarily held that unearned early retirement subsidies constitute liabilities under ERISA § 4044(d)(1). In so holding the Fourth Circuit stands alone. Having incorrectly treated "actuarial error" as if it were just a provision in the Mead Plan rather than a fundamental pension law provision with a settled meaning (App. 12a-13a), the court below compounded its error by asserting—inaccurately—that its view of the meaning of "contingent liabilities" was the one that "is specifically used under ERISA." App. 14a. These holdings squarely conflict with settled administrative agency positions and the holdings of other federal courts. They cannot be allowed to stand.

3. The Decision Below Creates Widespread Uncertainty And Calls Into Question Thousands Of Plan Terminations

The pension law terms at issue in this case are critical to any plan termination. No reversion of plan assets is permissible unless the surplus is the result of "actuarial error," and no surplus exists until all "contingent liabilities" have been satisfied. By giving these terms interpretations at odds with their established meanings, the decision below will have widespread and intolerable consequences that must be corrected and prevented by this Court.

First, the decision below creates a basis for reopening thousands of plan terminations in which billions of dollars have reverted to employers through use of the previously-accepted meanings of "actuarial error" and "contingent

[14] *See, e.g.*, ERISA § 4001(a)(16) (defining "benefit liabilities" under Title IV as equivalent to Code § 401(a)(2) liabilities); ERISA § 4041(b)(1)(D) (a "standard"—*i.e.*, voluntary—plan termination is permissible only if plan assets are sufficient to pay all "benefit liabilities").

liabilities." According to the PBGC, in the period from 1980 to 1989, approximately 2,041 plans with assets over $1 million terminated, resulting in distributions of over $26 billion to plan participants and reversions of over $20 billion to employers. *See* PBGC Br. on Remand at 4 n.2. Under the decision below, none of these reversions was proper unless the plan surpluses were caused by a "computational error." *See* App. 12a. The PBGC and the IRS, however, have never applied such a definition in approving prior plan terminations. *See* PBGC Br. In Support of Rehearing 9 (App. 188a). Accordingly, the court of appeals' new construction invites plan participants to reopen previously settled terminations and to claim entitlement to assets recouped by the employer. Under ERISA § 502, plan participants may bring suits in state or federal courts to recover benefits. Moreover, many of the terminations and reversions taking place during the 1980s remain subject to attack since a § 502 action generally is controlled by the forum state's statute of limitations for breach of a written contract (*e.g., Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430 (8th Cir. 1988)), which may extend out as long as 15 years. *See, e.g.*, Ohio Rev. Code Ann. § 2305.06 (Anderson 1991).

To attempt now to revisit completed plan terminations that were approved by the PBGC and the IRS would seriously disrupt the stability of the nationwide pension system, a result in conflict with ERISA's concern for the "soundness and stability" of pension plans. ERISA § 2(a). Moreover, the stability of the PBGC, the agency that Congress has created to administer the plan termination insurance program, could be threatened. The PBGC is already burdened with a $1.9 billion deficit that could grow to $11.4 billion over the next ten years. Special Problems In Bankruptcy: Hearing Before the Courts & Admin. Prac. Subcomm. of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 4 (1991) (statement of James B. Lockhart III, Executive Director, PBGC). By opening up potential new liabilities under ERISA

§ 4003(f), which subjects the PBGC to civil suits by any plan participant "adversely affected by any action of the corporation," the decision below could conceivably add to the liabilities of an already overburdened agency. Relying on § 4003(f) plan participants who did not receive unearned early retirement subsidies in plan terminations approved by the PBGC could seek to recover those benefits directly from the agency or to require it to initiate costly proceedings to recover reverted assets from sponsoring employers.

Second, the decision below creates confusion for *future* plan terminations. The two pension law provisions involved here are incorporated into virtually all tax-qualified pension plans. *See supra* p. 10. Given the court of appeals' new gloss on the meaning of these provisions, employers terminating pension plans must decide whether to follow previously settled law or the new approach articulated below. Should they, for example, recoup only surplus assets attributable to "computational errors" by their actuaries, or should they follow the agencies' approach and recoup all assets remaining after satisfaction of plan liabilities. Indeed, to comply with the conflicting decisions of the courts of appeals, an employer must pay two employees of identical age and work history radically different benefits if one happens to reside in South Carolina—in the Fourth Circuit—and the other resides across the border in Georgia—in the Eleventh Circuit. *Compare* App. 12a, *with Blessitt*, 848 F.2d at 1170-71.

Third, the decision below creates an irreconcilable conflict with the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"). In REA Congress created, for the first time, limited statutory protection for unreduced early retirement benefits, but only for participants who satisfy all of their plans' age, service, or other conditions. *See* Code § 411(d)(6)(B). Thus if REA applied to the respondents, they would have been entitled to a portion of the early retirement subsidies *only* if they

had remained in Mead's employ and retired after reaching age 62 with 30 years of service—which none of them has done. *See* App. 3a-4a, 12a.[15] Clearly Congress, which enacted REA "to improve the delivery of retirement benefits" (98 Stat. at 1426), did not think it was cutting back on pre-existing rights. Nor would Congress have troubled itself to pass much less generous legislation if relief of the kind the court below invented were really the law prior to REA.

Fourth, the decision below undermines the security of pension plans by equating plan funding with creation of obligations for those pension plans. According to the court of appeals, because Mead has "set aside" funds to pay unreduced early retirement benefits, it must now pay such benefits before taking a reversion.[16] Under Code § 412, however, Mead had broad latitude in selecting the actuarial methods and assumptions to be used in funding the Plan. The effect of the decision below therefore is to punish Mead for having chosen a generous funding method that led to a substantial surplus. Not only is this result unfair, it may also lead to a pension system that is less securely funded and thus poses a greater risk to the already strained resources of the PBGC; as the court warned in *Chait v. Bernstein*, 835 F.2d at 1027, "[a]n employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan—a result that would benefit no one."

Finally, the decision below interferes with administration of ERISA and the Code by the responsible agencies, the PBGC, and the IRS. The PBGC—which faces considerable financial exposure as a result of the decision

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[15] REA applies only to plan terminations adopted on or after July 30, 1984. *See* REA § 302, 98 Stat. at 1451-52.

[16] *See* App. 10a, 12a. This amounts to little more than a resurrection in yet another form of the benefits expectation theory that underlay the court of appeals' prior decision (App. 52a), and that otherwise has been laid to rest in the circuits that have addressed it. *See, e.g.*, *Blessitt*, 848 F.2d at 1175-76.

below (*see supra* pp. 25-26)—demonstrated its grave concern with the court of appeals' decision by taking the unusual step of filing an amicus brief in support of rehearing and warning that the decision "does violence" to established pension law concepts. *See* PBGC Br. In Support of Rehearing at 11 (App. 189a). This Court should grant certiorari to resolve the conflicts created by the decision below, to prevent further disruption in the administration of ERISA and the Code by the IRS and the PBGC, and to protect the PBGC and employers from a flood of litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 30, 1991

(2)

91-356

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,

v.

B.E. TILLEY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-3858

B.E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J.C. WEDDLE; WILLIAM D. GOODE,
Plaintiffs-Appellants,

v.

THE MEAD CORPORATION,
Defendant-Appellee,

AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN SOCIETY OF PENSION ACTUARIES; PENSION BENEFIT GUARANTY CORP.; AMERICAN ACADEMY OF ACTUARIES,
Amici Curiae.

Argued Feb. 5, 1990

Decided Feb. 26, 1991

As Amended June 3, 1991

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Gary D. Simms, Washington, D.C., on brief, for amicus curiae, American Academy of Actuaries.

Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

The case involves whether funds that remain in a single-employer defined benefit pension plan may, upon termination of the plan, revert to the employer prior to satisfaction of the plan's unreduced early retirement benefits. After the Mead Corporation ("Mead") recouped funds that remained in a pension plan without paying such benefits, employees brought suit alleging that Mead had violated the Employees Retirement Income Security Act ("ERISA"). In an earlier decision, we held in favor of the employees, requiring Mead to pay the unreduced early retirement benefits. An ERISA created benefit was deemed to have arisen. However, the Supreme Court reversed us on the issue, determining that the relevant language of ERISA did not itself create benefits but only

protected those benefits arising from other sources. The Supreme Court nevertheless remanded the case so that we could consider two alternate theories that might support a judgment in the employees' favor. We, therefore, proceed to consider whether either of the alternate theories requires a holding that Mead must pay to the plaintiffs the value of their unreduced early retirement benefits.

I.

B.E. Tilley, William L. Crotts, Jr., William D. Goode, Chrisley H. Reed, and J.C. Weddle, collectively referred to as the plaintiffs or the pensioners,[1] were employees of the Lynchburg Foundry Company, which Mead had acquired in 1968 as a wholly-owned subsidiary. They were covered by the Mead Industrial Products Salaried Retirement Plan ("Plan"), which was established by Mead and funded entirely by its contributions.

The Plan offered both normal retirement benefits and early retirement benefits. Normal retirement benefits, payable at age 65, were calculated with reference to a participant's earnings and years of service. Participants became eligible for early retirement benefits at age 55. Early benefits were calculated in the same manner as normal retirement benefits, but the amount payable was discounted by five percent for each year that the participant retired prior to the normal retirement age of 65. However, if a participant had 30 years or more of credited service, then he or she could retire at age 62 and still receive the normal retirement benefits payable at age 65 without any reduction. These "unreduced" early retirement benefits provide the bone of contention in the present dispute.

In 1983, Mead sold the Foundry and terminated the Plan. Participants who were age 55 or older were paid

[1] A sixth plaintiff, David H. Wall, died while the action was pending in the district court. The Supreme Court denied a motion to substitute his executor.

their age 65 benefit reduced five percent for each year they were under age 65. Mead paid the "unreduced" early retirement benefits only to those employees who satisfied both the age (62) and service (30 years) requirements. Tilley, Goode, Reed, and Weddle had over 30 years of credited service but had not yet reached age 62; Crotts had 28 years of service. Each of them received from Mead the present value of his normal retirement benefit—reduced by five percent for each year the participant was under age 65. The lump sum payments they received ranged from $50,000 to $87,000. If the pensioners had received the present value of the "unreduced" early retirement benefits—which they expected to receive upon reaching age 62—each of them would have received, on average, $9,000 more. After the Plan's liabilities, as determined by Mead, were satisfied, nearly $11 million in assets remained in the Plan. Mead recouped the remainder.

The pensioners filed suit in Virginia state court alleging that Mead's failure to pay the present value of the unreduced early retirement benefits violated ERISA. Mead removed the case to the United States District Court for the Western District of Virginia. The district court granted summary judgment for Mead, holding that the plaintiffs were not entitled to the value of the "unreduced" early retirement benefits.

We reversed the judgment of the district court and held that Mead was required to compensate the plaintiffs for the unreduced early retirement benefits. *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987). We reasoned that 29 U.S.C. § 1344(a)(6), which provides for the payment of "all other benefits under the plan" upon termination, encompassed the early retirement benefits at issue. 815 F.2d at 991.

The Supreme Court reversed our decision. *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796

(1989). The Supreme Court reasoned that § 1344(a) merely provides for the orderly distribution of plan assets to satisfy benefits that have already been earned under either the Plan or ERISA. It does not create additional benefit entitlements. 109 S.Ct. at 2163. In other words, § 1344(a) has a limited function; it is only an allocation mechanism.

But, significantly, the Supreme Court declined to rule on the two other theories advanced by the pensioners in support of their position: (1) that the unreduced early retirement benefits qualify as "accrued benefits," which vested upon termination of the Plan; and (2) that the unreduced early retirement benefits are "contingent rights or liabilities," which under ERISA must be satisfied prior to an employer's recoupment of surplus assets. 109 S.Ct. at 2164. Because we had not reached those issues in our original opinion, the Supreme Court remanded the case so that we could consider them.

Justice Stevens wrote the sole dissent in the case. He agreed that the Fourth Circuit erred in interpreting § 1344(a)(6) as the source of the pensioners' rights to recover the unreduced early retirement benefits. *Id.* at 2164. But he thought that the Court should have considered the plaintiffs' other two arguments instead of remanding the case back to the Fourth Circuit. He concluded that our decision should have been affirmed because he considered the benefits at issue to be "contingent liabilities." *Id.* at 2165. The dissent thus was confined to a protest of the Court's failure to address the other two arguments and the expression of a proposed resolution as to one of them not considered by any other member of the Court.

On remand from the Supreme Court, the pensioners advance the two theories which the Supreme Court declined to consider. They argue that the unreduced early retirement benefits are "accrued benefits" under ERISA.

They also contend that the benefits are "contingent rights or liabilities," which should have been paid prior to Mead's recoupment of the surplus assets.

II.

Under § 411 of the Internal Revenue Code, enacted by Title II of ERISA, Pub.L. No. 93-406, 88 Stat. 901 (1974) (codified as amended at 26 U.S.C. § 411), "accrued benefits" become "nonforfeitable" (vested) upon termination of a qualified pension plan. Code § 411(d)(3). If the unreduced early retirement benefits at issue here are "accrued benefits," then the pensioners had a vested right to those benefits upon plan termination. An analysis of the statutory scheme convinces us, however, that the unreduced early retirement benefits should not be considered "accrued benefits" within the meaning of ERISA.

Section 411(a)(7) defines the "accrued benefit" as

> the employee's accrued benefit determined under the plan and ... expressed in the form of an annual benefit commencing at normal retirement age.

26 U.S.C. § 411(a)(7); *see also* 29 U.S.C. § 1002(23) (same definition of "accrued benefit"). The language of the definition seems to consider only the annual benefits that begin at normal retirement age as "accrued benefits." The definition does not mention the unreduced early retirement benefits that companies, such as Mead, offer to veteran employees in addition to the normal retirement package.

The House Report that accompanied the House version of the bill ultimately enacted as ERISA contains the following:

> The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or

> life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. . . . Also, the accrued benefit to which the vesting rules apply is *not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age*, or so-called social security supplements. . . .

H.R.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726 (emphasis added). The Conference Report, accompanying the final version of the bill, seems to echo the understanding that early retirement benefits were not to be considered accrued benefits:

> Also, the *accrued benefit does not include the value of the right to receive early retirement benefits,* or the value of the social security supplements or other benefits under the plan which are not continued for any employee after he has attained normal retirement age.

H.R.Conf.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054. Nothing in the legislative history supports the pensioners' argument that early retirement benefits are "accrued benefits."

The IRS has promulgated a regulation that accords with the understanding that early retirement benefits are not "accrued benefits" under the statute:

> In general, the term "accrued benefits" refers only to pension or retirement benefits. . . . For purposes of this paragraph *a subsidized early retirement benefit which is provided by a plan is not taken into account*. . . .

Treas. Reg. § 1.411(a)-(7)(a)(1)(ii) (1989).

Indeed, we have previously held that unreduced early retirement benefits are not "accrued benefits." In *Sutton*

v. Weirton Steel Div'n of Nat'l Steel Corp., 724 F.2d 406 (4th Cir.1983, *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), employees sued National Steel, claiming that the company's modification of their pension benefits violated ERISA. *Id.* at 409. Although National Steel had guaranteed the payment of the employees' normal retirement benefits in an agreement to sell the division, it had not provided for the payment of the plan's early retirement benefits, which were unfunded and only payable in the event of a plant shut-down. *Id.* We held that the early retirement benefits at issue were not "accrued benefits," and therefore, the company's modification did not violate ERISA. "Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements." *Id.* at 410.

The pensioners, however, cite our opinion in *Collins v. Seafarers Pension Trust*, 846 F.2d 936 (4th Cir. 1988), for the proposition that the early retirement benefits at issue here were accrued benefits. In that case, employees had sued a multiemployer pension plan, claiming that an amendment to the plan had violated ERISA by excluding past service credits from the calculation of "early normal pension" eligibility. *Id.* at 937. We reversed the district court's grant of the defendants' summary judgment motion, concluding that procedural noncompliance had invalidated the amendment. In doing so, we agreed with the district court that "the right to receive a pension for past service is an accrued benefit even before actual retirement." *Id.* at 938. We did not decide, however, that unreduced early retirement benefits are accrued benefits under ERISA. To the extent that the district court opinion in the case, 641 F.Supp. 293 (D.Md. 1986), which was reversed on other grounds, can be read to support such a rule, we reject it as inconsistent with the language and legislative history of ERISA as well as *Sutton*. Rather, we hold that the unreduced early retirement benefits at issue here are not "accrued benefits" within the meaning of ERISA. *See Bencivenga v. West-*

ern Pa. Teamsters & Employers Pension Fund, 763 F.2d 574, 580 (3d Cir. 1985). *But see Amato v. Western Union Int'l,* 773 F.2d 1402, 1414 (2d Cir.1985), *cert. dismissed,* 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986).

III.

We thus are brought to the question of whether the unreduced early retirement benefits at issue are "contingent liabilities" that must be satisfied prior to reversion of the Plan's surplus assets to Mead. In harmony with Justice Stevens,[2] we conclude that the terms of the Plan itself, as enforced by ERISA, only permit reversion of the surplus assets after Mead has paid the pensioners the value of the unreduced early retirement benefits. Accordingly, we have no need formally to adjudicate the issue, beset with problems, of whether, in the absence of such terms in the Plan, the provisions of ERISA would still require payment of the benefits here.

A.

Both parties, along with four groups participating as *amici curiae*, have brought forth a mishmash of statutory provisions, regulations, legislative history, and actuarial lore in an attempt to persuade us that ERISA does, or does not, include the unreduced early retirement benefits as "liabilities" of the Plan. 29 U.S.C. § 1344(d)(1) provides that funds may be recouped by an employer only if "all liabilities of the plan to participants and their beneficiaries have been satisfied." Similarly, § 401(a)(2) of the Code requires qualified pension plans to satisfy "all liabilities" before surplus assets may revert to the employer. The pensioners contend that "liabilities" includes "contingent liabilities" and that the unreduced early retirement benefits are contingent liabilities. In that vein,

[2] The other eight Justices did not reject the theory of Justice Stevens' dissent. Rather they did not resolve, but left to another day, the issue presented.

the pensioners point to a Treasury regulation that interprets § 401 of the Code as including both fixed and contingent liabilities. *See* Treas. Reg. § 1-401-2(b)(2) (1989). They also roll out the legislative history of Code § 401 to demonstrate that the original understanding of Congress was that only the surplus resulting from actuarial computational error was revertible, thereby mandating the satisfaction of the unreduced early retirement benefits—for which funds had been set aside. *See* S. Rep. No. 1567, 75th Cong., 3d Sess. 24 (1938).

Mead, however, argues that the unreduced early retirement benefits were not liabilities because no obligation to pay the benefits arose until the employees satisfied both the age and service requirements. Mead also contends that ERISA's notion of liabilities includes only "accrued benefits" under ERISA. *See supra* Part II. They assert that the longstanding administrative practice of the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service has been *not* to treat the unreduced early retirement benefits as liabilities that must be satisfied prior to asset reversion. The PBGC, as *amicus curiae*, argues in support of Mead's position. Both the American Society of Actuaries and the American Academy of Actuaries have submitted *amicus curiae* briefs, arguing that the actuarial profession's understanding of ERISA has always been that unearned early retirement benefits are not "liabilities of the plan." [3]

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[3] Another complication is the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), which amended ERISA, effective July 30, 1984, to require that pension plans treat early retirement benefits *as if they were* "accrued benefits" in some instances. *See* 29 U.S.C. § 1054(g)(2). The present case is governed by pre-REA law; the requirements added by REA are inapplicable. But Mead and the PBGC argue that holding early retirement benefits to be accrued benefits would render REA an unnecessary enactment. They conclude that the enactment of REA sheds light on what ERISA's use of "liabilities" means and that Congress did

We find it unnecessary to resolve the apparent conflict between current practice and legislative and regulatory history because we conclude that the terms of the Plan itself, as enforced by ERISA, compel payment of the unreduced early retirement benefits to the pensioners.[4]

B.

Section 1344(d)(1) provides that the residual assets in a single-employer pension plan may be recouped only if "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1). Article XIII, § 4(f) *of the Plan* provides that in the case of discontinuance of the Plan:

> Any surplus remaining in the Retirement Fund, *due to actuarial error*, after the satisfaction of all benfit rights or *contingent rights* accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the per-

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not think "liabilities" included unreduced early retirement benefits or else it would not have passed some of the provisions of REA. Yet the legislation might have been enacted to remove all doubt where there previously had been uncertainty as to what was meant.

[4] The dissent's position that our opinion disregards the Supreme Court's mandate is incorrect. The Court directed us to consider on remand whether the pensioners are entitled to payment of their unreduced early retirement benefits under either of their alternative theories: (1) that the benefits are accrued benefits under ERISA; and (2) that the benefits are liabilities of the plan under 29 U.S.C. § 1344(d)(1)(A). We reject the first theory. Nevertheless, we accept the second theory, that the benefits are liabilities of the plan, because we hold, consistent with Justice Stevens' position, that the language of the plan itself compels payment of the benefits. Whether ERISA would compel payment of the benefits in the absence of such lanugage in the plan is a question that is unnecessary to answer and one whose answer has not been compelled by the Supreme Court.

> tinent provisions of federal or state law, be returnable to [Mead].

Id. (emphasis added). Thus the Plan itself only allows recoupment of surplus funds that result from "actuarial error," and then only after the satisfaction of all "contingent rights accrued under the Plan." We conclude that reversion of the Plan's surplus funds to Mead is only permissible after satisfaction of the pensioner's unreduced early retirement benefit rights because: (1) the funds in the Plan that had been set-aside in expectation of fulfilling the unreduced early retirement benefits did not remain in the Plan "due to actuarial error"; and (2) the benefits at issue are "contingent rights" that must be paid prior to any reversion.

Mead contributed to the Plan in expectation of having to satisfy the unreduced early retirement benefits. When the Plan was terminated, only those employees who had satisfied both the age and service requirements were paid. The employees who, with reason, expected to receive the unreduced early retirement benefits in the future, such as the plaintiffs here, were not paid. The funds that had been set aside in expectation of paying those benefits were recouped by Mead. That surplus, which remained in the Plan only because the value of the unreduced early retirement benfits were not paid, was not "due to actuarial error."

"Actuarial error" seems to reference computational error resulting from inaccurate statistical assumptions. If the Plan's actuary had used precise statistical assumptions regarding the future value of Plan assets and the requirements of its beneficiaries, the Plan would have still contained a surplus on termination—the amount contributed in expectation of satisfying the pensioners' unreduced early retirement benefits, which Mead later decided not to pay.

Mead argues that the contributions made to the Fund in expectation of paying the benefits at issue did consti-

tute actuarial error because the actuaries could not have foreseen termination of the plan or nonpayment of the unreduced benefits. But if "actuarial error" means the cause of whatever remains in the Plan when a class of benefits, reasonably expected by participants and funded all the time the Plan is in operation, is terminated, then the phrase contributes no meaning to the contractual provision and is utterly redundant.[5] More importantly, used in such a way, the word "actuarial" is rendered unnecessary. We interpret "actuarial error," as used in Article XIII of the Plan, so as not to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel.

Furthermore, we think that Mead was obligated to pay the unreduced early retirement benefits because the Plan mandated the satisfaction of "contingent rights accrued under the Plan." The unreduced early retirement benefits were "contingent rights" because the Plan was liable to pay them on a contingency, *i.e.*, the plaintiffs' satisfaction of the age and service requirements. "Contingent" means nothing less. In the lay world, it is defined as "likely but not certain to happen." *Webster's New Collegiate Dictionary* 243 (1981). *Black's Law Dictionary* defines "contingent liability" as a liability "which is not now fixed and absolute, but which will become so in the case of the occurrence of some future and uncertain event." *Black's Law Dictionary* 291 (5th ed. 1979). In the ERISA world, the concept of "contingent" is used in a similar fashion:

> [I]f 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed

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[5] It drastically stretches plain meaning to hold that calculations and set asides, correct when made, later, retroactively, became computation errors when termination made recoupment to the employer possible.

> the required period of service, *contingent obligations* to such 700 employees have nevertheless arisen which constitute "liabilities". . . .

Treas. Reg. § 1.401-2(b)(2) (1989) (emphasis added). The terms of the Plan were written in light of the regulation, which was first promulgated in 1943—long before establishment of the Plan, and conform to the plain meaning of the word "contingent." The plaintiffs would have had a fixed right, a vested right, upon reaching age 62, to the unreduced early retirement benefits. At times before the attainment of age 62 that right still existed though future and uncertain. Therefore, the plaintiff's rights in the unreduced early retirement benefits were "contingent," as the word is commonly used and as it is specifically used under ERISA.

Mead argues, however, that the Plan requires satisfaction of "contingent rights *accrued under the Plan*," and that the unreduced benefits were not accrued under the Plan, because the employees had not satisfied the conditions for the benefit rights they seek—the age and service requirements. But requiring the employees to have satisfied the conditions for the benefit, making it vest, would make a nullity of the concept of *contingent* rights, which are protected by the terms of the Plan.

Mead might have also argued that "contingent rights accrued" refers to the technical ERISA concept of "accrued benefits," and that because the unreduced early retirement benefits should not be deemed accrued benefits under the statute (*see supra* Part II), they need not be satisfied prior to the reversion of surplus assets. All in all, such an interpretation would require a tremendous leap of faith. The Plan incorporates no such reference to Code § 411(a)(7)'s concept of "accrued benefit," nor does the Plan manifest an intent to effect such an incorporation.

Furthermore, such an incorporation would make little sense. Upon termination of a single-employer defined ben-

efit plan, all accrued benefits vest. "Post-termination *contingent* 'accrued benefits'" is an oxymoron. If we were to conclude that the Plan's protection is coterminous with the scope of ERISA, the word "contingent," as used in the Plan, would become devoid of any meaning. Rather, § 4(f)'s protection of "contingent rights" leads us to conclude that Mead must pay the value of those pension benefits for which it would otherwise have become liable "but for" its termination of the Plan. Because Mead's termination of the Plan was what prevented the pensioners from satisfying the conditions so that the unreduced early retirement benefits could vest, the terms of the Plan allow the surplus funds to revert to Mead only after the unreduced early retirement benefits are satisfied.

Indeed, Justice Stevens, the only Supreme Court justice to reach the issue, also considered the early retirement benefits to be "contingent rights." He noted that the pensioners "have far more than an expectancy interest in early retirement benefits." 109 S. Ct. at 2165. "Their right to payment is contingent only upon their election to retire after reaching age 62." *Id.*[6] Justice Stevens also noted that the pensioners' rights were frustrated entirely by the unilateral actions of Mead. Finally, he recognized that Mead was required, both by IRS rulings and prudent actuarial practice, to accumulate the funds necessary to pay the early retirement benefits at issue. *Id.*

In interpreting the provisions of the Plan, we recognize that ERISA's central policy goals are to protect the interests of employees and to guard against the termination of retirement benefits for which employees have been working. *See* 29 U.S.C. § 1001; *Shaw v. Delta Air Lines*, 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L. Ed. 2d 490 (1983). We hold that the Plan's provisions compel satisfaction of the unreduced retirement benefits prior to reversion of the surplus assets.

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[6] For four of the five plaintiffs, the expectancy has endured and matured into a reliance for more than 30 years.

We reverse the decision of the district court and remand for further proceedings consistent with this opinion.[7]

REVERSED.

WIDENER, Circuit Judge, concurring:

I concur in the result and in all of the majority opinion. I add only that I especially believe that the rights involved in this case are "contingent rights accrued under the Plan." Maj. op. p. 762. See also the first page of Justice Stevens' dissenting opinion in the opinion of the Supreme Court in case 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989).

CHAPMAN, Circuit Judge, dissenting:

I dissent from Section III of the majority opinion for two reasons. First, I believe that unreduced early retirement benefits are not "liabilities" within the meaning of § 4044(d)(1)(A). Second, I believe that the language of Mead's Plan itself does not require the payment of unreduced early retirement benefits upon termination of the Plan. Therefore, I would find that the plaintiffs are not entitled to unreduced early retirement benefits from Mead.

I

Initially, I feel that the majority disregards the complete instructions given by the Supreme Court. What the Court said is worth repeating:

> Respondents [Plaintiffs], however, offer two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: first,

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[7] We deny the appellee's pending motion for leave to file a revised statutory appendix as it is unnecessary in light of the availability of the materials the revised appendix includes.

> unreduced early retirement benefits may qualify as "accrued benefits" under ERISA; and, second, unreduced early retirement benefits may be "liabilities" within the meaning of § 4044(d)(1)(A), 29 U.S.C. § 1344(d)(1)(A). Because the court of appeals concluded that § 4044(a)(6) was a source of entitlement for unaccrued benefits, it did not reach these questions. We therefore remand for a determination whether respondents [plaintiffs] are entitled to damages on the basis of either of these alternative theories.

Mead Corp. v. Tilley, 490 U.S. 714, 109 S.Ct. 2156, 2164, 104 L.Ed.2d 796 (1989). Although the majority duly undertakes to resolve the first issue presented by the Court, the majority declines to grapple with the complexities of the second issue, as the Court had requested. Consequently, instead of analyzing the meaning of "liabilities" under § 4044(d)(1)(A), the majority investigates whether "the plan provides for such distribution in these circumstances" under § 4044(d)(1)(C), and holds that it does.

I feel that the majority brushes aside the Supreme Court's quite explicit language requiring this court to ascertain the meaning of "liabilities" under § 4044(d)(1)(A). The Court has held consistently that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948). *See also* 5B C.J.S. *Appeal & Error* § 1966 (1955) ("On the remand of the cause after appeal, it is the duty of the lower court to comply with the mandate of the appellate court and to obey the directions therein, without variation and without departure from the mandate of the appellate court.").

In this case, the majority deviates from the Court's mandate when it finds it "unnecessary" to resolve an issue

that the Court clearly wanted to be addressed, having called it a "complicated and important issue[] pertaining to the private pensions of million of workers." *Mead Corp.*, 109 S.Ct. at 2164 n. 11. Indeed, the Court felt the issue important enough that it hesitated to plunge forward "[w]ithout the views of agencies responsible for enforcing ERISA *or an opinion by the Court of Appeals.*" *Id.* (emphasis added). By failing to express an opinion on this issue, the majority discards the views submitted by the amici curiae and ultimately delays the development of the law.

However, I think that the majority may address the terms of the plan under § 4044(d)(1)(C), because "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 781, 83 L.Ed. 1184 (1939). Indeed, if the majority had held that unreduced early retirement benefits were "liabilities," then it would have been obliged to address the other two requirements of § 4044(d)(1) which an employer must meet before recouping surplus funds. Consequently, I shall address both the issue remanded by the Court and the issue dealt with by the majority.

II

Section 4044(d)(1)(A) of ERISA states that "any residual assets of a single-employer plan may be distributed to the employer if . . . all liabilities of the plan to participants and heir beneficiaries have been satisfied." 29 U.S.C. § 1344(d)(1)(A). The issue on remand is whether unreduced early retirement benefits are "liabilities of the plan," thereby requiring Mead, upon the termination of its Plan, to distribute any residual assets to the plaintiffs, who had satisfied some but not all of the requirements for entitlement to such benefits. I do not find that unreduced early retirement benefits are "liabilities" for two reasons. First, it appears that this term,

which is not defined in ERISA, does not itself create any liabilities for benefits; such liabilities are created elsewhere in ERISA. Second, even if one looks to the analogous and better-defined use of the term "liabilities" in 26 U.S.C. § 401(a)(2) of the Internal Revenue Code (Code), "liabilities" clearly encompasses only "accrued benefits," which, Section II of the majority opinion says, unreduced early retirement benefits are not.

A. The Meaning of "Liabilities" under ERISA

The plaintiffs' contention—that unreduced early retirement benefits are "liabilities"—turns on the assumption that the word "liabilities" in § 4044(d)(1)(A) has a substantive meaning of its own. The assertion is belied by several facts. First, the only source of liabilities under ERISA is the accrual and vesting provisions outlined in Title I, which sets forth an elaborate framework to determine an employee's right to benefits. *See* 29 U.S.C. §§ 1053-1054. But § 4044 is part of Title IV, which provides for insurance for benefits created elsewhere. Thus, § 4044 simply establishes, as its title indicates, a mechanism for the "[a]llocation of assets," not the creation of liabilities. Moreover, neither ERISA nor its legislative history define the meaning of "liabilities." If Congress meant for the term to create substantive rights in addition to those found elsewhere in ERISA, Congress doubtlessly would have attempted to breathe some meaning into it.

This conclusion follows directly from the Supreme Court's opinion in this case. The Court addressed the issue whether unreduced early retirement benefits must be distributed before an employer can recoup any residual plan assets under § 4044(a)(6), which states that

> [i]n the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the

> participants and beneficiaries of the plan in the following order:
>
> * * * *
>
> (6) Sixth, to all other benefits under the plan.

29 U.S.C. § 1344(a)(6). Holding that § 4044(a) is "a distribution mechanism and not a source for new entitlements," the Court explained that

> [s]ection 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6)—"benefits *under the plan*"—can refer only to the allocation of benefits provided by the terms of the terminated plan.

Mead Corp., 109 S.Ct. at 2162 (emphasis in original). The Court thought it "inconceivable that [§ 4044(a)] was designed to modify the carefully crafted provisions of Title I," which expressly creates rights to benefits. *Id.* I believe that the Court's analysis of § 4044(a) is equally applicable to § 4044(d)(1)(A) and supports the view that the term "liabilities" does not create a right to any benefits, especially unreduced early retirement benefits.

B. The Meaning of "Liabilities" under the Code

The parties urge this court to look to the similar language and restrictions imposed by § 401(a)(2) of the Code. This section states that a pension constitutes a "qualified trust" entitled to special tax treatment

> if under the trust instrument it is impossible, *at any time prior to the satisfaction of all liabilities* with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.

26 U.S.C. § 401(a)(2) (emphasis added). We agree with the parties that the meaning of "liabilities" under the

§ 401(a)(2) of the Code and under § 4044(d)(1)(A) of ERISA is the same, making it quite appropriate to ascertain the scope of liabilities under the Code as construed by the Internal Revenue Service (IRS) and the courts. However, the parties dispute whether liabilities under § 401(a)(2) of the Code includes unreduced early retirement benefits, and I would hold that it does not.

In Treas.Reg. §1.401-2(b), the IRS gives two insights into the meaning of "liabilities" in § 401(a)(2).[1] First, the regulations states that "[t]he 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees." Treas.Reg. § 1.401-2(b)(2) (1960).[2] *Accord* Rev.Rul. 85-6, 1985-1 C.B. 133, 144. Fixed liabilities, the IRS has further explained, "are the benefits payable to those who have become entitled to them." Rev.Rul. 53-33, 1953-1 C.B. 267, 273. It is manifest that the unreduced early retirement benefits at stake here are not fixed, because none of the plaintiffs had satisfied the Plan's prerequisite that one reach the age of 62. However, contingent liabilities "are the benefit credits *accrued* up to the time of termination of the trust for employees (and their beneficiaries) who might have become

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[1] We note that there is a strong presumption in favor of the validity of Treasury Regulations. *See Bob Jones University v. United States*, 461 U.S. 574, 596, 103 S.Ct. 2017, 2030, 76 L.Ed.2d 157 (1983). Indeed, the Supreme Court urged this court on remand to "consider the views of the PBGC [Pension Benefit Guaranty Corporation] and the IRS," explaining that "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp.*, 109 S.Ct. at 2164 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 798, 63 L.Ed.2d 22 (1980)).

[2] While Treas.Reg. § 1.401-2 predates ERISA, it is applied to post-ERISA plans under Treas.Reg. § 1.401(a)-2. *See Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 n. 15 (11th Cir.1988).

entitled to benefits if the trust had been continued indefinitely." *Id* (emphasis added). *Accord* Rev.Rul. 57-163, 1957-1 C.B. 128, 138; Rev.Rul. 61-157, 1961-2 C.B. 67, 79; Rev.Rul. 65-178, 1965-2 C.B. 94, 110; Rev.Rul. 69-421, 1969-2 C.B. 59, 69; Rev.Rul. 71-152, 1971-1 C.B. 126; I.R.S. Pub. No. 778, pt. 3(d) (February 1972).

Under the Code, then, this issue depends on whether plaintiffs' unreduced early retirement benefits had "accrued" at the time the Plan was terminated. Section II of majority opinion has already answered this question in the negative. Analyzing the language, legislative history, and regulatory interpretation of "accrued benefits" as defined by § 411(a)(7) of the Code and § 3(23) of ERISA, the majority held that the unreduced early retirement benefits are not "accrued benefits" under the Code and ERISA. Therefore, "liabilities" under the Code and ERISA does not include unaccrued benefits such as unreduced early retirement benefits. This analysis is fully consistent with my belief, expressed above, that in order to ascertain the scope of "liabilities" under ERISA, it is ultimately necessary to look at the substantive rights created by the vesting and accrual provisions of the statute, as well as the terms of the pertinent plan. *See May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir.1990); and *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir.1988).

The plaintiffs contend that the "liabilities" that the employer must satisfy before recoupment only excludes those funds remaining "due to erroneous actuarial computation," citing the other reference to "liabilities" in Treas. Reg. § 1.401-2(b):

> The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust,

> and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust.

Treas.Reg. § 1.401-2(b)(1). *See also* S.Rep. No. 1567, 75th Cong., 3d Sess. 24 (1938). From this, the plaintiffs reason as follows: first, liabilities thus include all funds comprising correct actuarial computations; second, correct actuarial computations correlate directly with the proper measure of funding for a plan; and third, the proper measure of funding includes, according to the IRS, accounting for the effect of a plan's unreduced early retirement benefit, Rev.Rul. 78-331, 1978-2 C.B. 158 (stating that the requirement under § 412(c)(3) of the Code that actuarial assumptions be reasonable might be violated if the plan ignored "the effect of a plan's subsidized early retirement benefit on the frequency of early retirement"). Therefore, the plaintiffs conclude that liabilities include whatever the employer funds under its plan.

The plaintiffs' logic is seductively simple but fatally flawed. The mere fact that an employer has funded a future benefit based on actuarial assumptions does not mean that an employer has assumed a liability with respect to any particular employee who may become entitled to the benefit. In funding a plan, an employer attempts, with the assistance of an actuary, to make certain that in the aggregate there will be sufficient assets to meet all benefit claims as they arise in the future. The employer does not fund benefits on a present liability basis; no specific assets are set aside for or may be claimed by any employee. An employer incurs a liability and an employee becomes entitled to accumulated funds only when the conditions for receiving a given benefit are met, and no earlier. To link benefits with funding, as the plaintiffs urge, would transform Mead's plan from a defined benefit plan, in which benefits are based typically on a formula taking into account the employee's employ-

ment service and compensation, into a defined contribution plan, in which benefits are based on the amounts contributed and invested. *See Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, No. 88-1237, slip op. at 7-8 (W.D.Pa. June 21, 1990).

Reflecting this reality, the IRS has adopted a broad construction of the term "erroneous actuarial computation," explaining in Treas.Reg. § 1.401-2(b)(1) that

> [a] balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding.

An "erroneous actuarial computation" is not a narrow, technical term; it does not simply refer to a statistical error made at the time of the funding of a plan. This is because an "erroneous actuarial computation" may exist even if the actuarial valuations are made by a "competent" actuary using "reasonable assumptions" and "correct procedures."

Instead, the term "erroneous actuarial computation" is simply short-hand for what is left over after all vested and contingent obligations created in the plan are satisfied. This is plainly evident from the hypothetical used by the IRS in § 1.401-2(b)(1):

> For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with

> the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all of the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation.

In other words, whatever remains after the satisfaction of "all of the liabilities under the plan" is the result of an "erroneous actuarial computation." [3] Therefore, I would find that the term "erroneous actuarial computation" does not impose any substantive limitation on what an employer can recoup. Such limitations are found in

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[3] The IRS subsequently reiterated this framework:

> Section 1.401-2(b)(2) provides that liabilities that must be satisfied include both fixed . . . and contingent . . . liabilities. *After satisfaction of those liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error.*
>
> . . . .
>
> For purposes of section 1.401-2(b)(2), the valuation of benefits as permitted under Title IV may be used in determining whether there is any surplus due to an actuarial error. Therefore, *after cash distributions have been made* to the participants in this plan in amounts equal to the present value . . . of their total benefits, *any remaining assets (i.e. those resulting from actuarial error) may revert to the employer* without causing a violation of the non-diversion rule of section 1.401-2 of the regulations.
>
> Similarly, *when fixed and contingent liabilities are discharged* through the purchase of a contract or contracts from an insurance company which provides the benefits with respect to individuals for whom the liabilities are determined, *the remaining assets may be considered surplus arising from actuarial error and revert to the employer.*

Rev.Rul. 83-52, 1983-1 C.B. 87, 87 (emphasis added).

the benefit and accrual provisions of ERISA as well as in the terms of the plan itself.[4]

This is the only coherent and defensible way to construe § 401 of the Code. Giving an independent meaning to the term "erroneous actuarial computation" could produce unwieldy results. For example, if a plan had $10 million in plan assets and only $8 million in vested and contingent rights to benefits upon its termination, and if only $1 million of the remaining $2 million is attributable to "erroneous actuarial computation," using a literal construction of the term, who has what right to the $1 million in pension assets that are not claimed as vested or contingent rights and are not the result of an "erroneous actuarial computation"? Neither ERISA or the Code gives us an answer, most likely because neither intended the term "erroneous actuarial computation" to be interpreted in this literal way, but instead intended that the phrase be interpreted and understood as set forth in the above hypothetical used by IRS.

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[4] The plaintiffs point out that any surplus resulting from "a change in the benefit provisions or in the eligibility requirements of the plan . . . could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation." Treas.Reg. § 1.401-2(b)(1). But the plaintiffs assume incorrectly that a termination of a plan is the same thing as a change in a plan's benefit or eligibility provisions. It is not, as shown by the explicit distinction in Treas.Reg. § 1.401-2(b)(1) between a liquidation of a plan, in which anything left over is the result of an "erroneous actuarial computation," and a change in the plan, in which any surplus caused by the change is not the result of an "erroneous actuarial computation." To hold otherwise would mean that an employer could not terminate a plan without paying all employees the benefits that they might have earned under the plan if it had continued indefinitely. However, this verges on the creation of a "benefit expectations" theory, of which the IRS and courts have disapproved. Gen.Couns. Mem. 39,665 (Sept. 25, 1987), IRS Positions (CCH) ¶ 1971; *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1173 & n. 20 (11th Cir.1988).

C. The Enactment of the Retirement Equity Act of 1984.

The enactment of the Retirement Equity Act of 1984 (REA) confirms that unreduced early retirement benefits were not liabilities under ERISA before the REA was passed. Section 301(a) of the REA amended § 204(g) of ERISA, 29 U.S.C. § 1054(g), and § 411(d)(6) of the Code, to require that terminating plans treat early retirement benefits as if they were accrued benefits in some circumstances, thereby making any reduction in such benefits prohibited. Specifically, § 301(a) of the REA requires payment of "retirement-type subsid[ies] . . . to a participant who satisfies (either before or after [a plan termination]) the pre-[termination] conditions for the subsidy." 29 U.S.C. § 1054(g)(2). *See also* 26 U.S.C. § 411(d)(6)(B). In other words, an employee has the right to meet the conditions specified in the plan for retirement-type subsidies by continued service with the employer after plan termination. The amount of the subsidy, however, is limited to "benefits attributed to service before" the termination of the plan. *Id.* Thus, the REA only requires payment of benefits accrued at the time of the termination of the plan, and not of benefits that might have accrued subsequently. *See* Rev. Rul. 86-48, 1986-1 C.B. 216, 217; Rev.Rul. 85-6, 1985-1 C.B. 133, 134.

If the plaintiffs are correct—that ERISA requires the payment of unreduced early retirement benefits upon a plan's termination, then the REA is redundant to the extent that it now requires such benefits and creates a contingent liability for them. The majority is not convinced by this argument and suggests that the REA "might have been enacted to remove all doubt where there previously had been uncertainty as to what was meant" under ERISA before the REA. I disagree for several reasons. First, the legislative history indicates that Congress thought it was creating a new benefit un-

der ERISA and the Code. *See* 130 Cong.Rec. H4251 (daily ed. May 22, 1984) (statement of Rep. Erlenborn) (stating that early version of the REA, which did not make retirement-type subsidies accrued benefits, did not "change the definition of accrued benefit so as to in any way affect benefits payable under a terminated plan."); and 130 Cong.Rec. H8763 (daily ed. Aug. 9, 1984) (statement of Rep. Roukema) (stating that section 301(a) of the REA, as finally passed, is a "change from present law" that "means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will now have to be allocated to participant benefits.").

Second, the IRS apparently believes that the REA changed prior law. In Rev.Rul. 85-6, 1985-1 C.B. 133, 134, the IRS "consider[ed] Rev.Rul. 83-52, 1983-1 C.B. 87, in light of the enactment of section 301" of the REA, and decided to "modif[y] and superced[e]" the Revenue Ruling's implications for retirement-type subsidies. The IRS concluded that the Code now required an employer to pay "a participant who satisfies (either before or after the [the termination of the plan]), the pre-[termination] conditions for the subsidy." *Id.* As a result, the IRS offered several ways for an employer to meet the vesting requirements in § 411 of the Code and thereby be able to recover the surplus.

Finally, it is clear that the REA does not in any way support plaintiffs' claims under ERISA insofar as they go beyond what the REA requires in two respects. The plaintiffs claim a right to unreduced early retirement benefits, even though they can not satisfy the conditions specified in the plan, and they seek the value of the subsidy not only for pre-termination service but also for post-termination service. If this theory is correct, then the REA actually reduced the protection given to retirement-type subsidies at termination, because the

REA mandates the subsidy only for those employees who actually satisfy the conditions of the plan, and then only based on pre-termination service. This is an unlikely scenario, and for these reasons, I do not believe that the REA simply removed any doubt as to the meaning of ERISA. Instead, the REA created new rights not found under prior law.[5]

III

The majority bases its holding on § 4044(d)(1)(C) of ERISA, which states that the residual assets in a single-employer pension plan may be recouped if "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1)(C). Article XIII, § 4(f) of the Plan provides:

> Any surplus remaining in the Retirement Fund, *due to actuarial error*, after the satisfaction of all benefit rights *or contingent rights accrued under the Plan* . . . shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

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[5] In finding that unreduced early retirement benefits are not "liabilities" under ERISA and the Code, I do not endorse the Pension Benefit Guaranty Corporation's (PBGC) traditional position insofar as it holds that "liabilities" in § 4044(d)(1)(A) is coextensive with the benefits included in the six priority categories in § 4044(a), and that therefore the scope of liabilities is determined by reference to the benefits allocated according to § 4044(a). *See* 29 C.F.R. § 2618.3, .13, .14, & .15; 40 Fed.Reg. 51,368-51,-370 (1975); and 46 Fed.Reg. 49,842-49,843 (1981). The Supreme Court's ruling in this case expressly held that § 4044(a) is solely an allocation scheme and does not give rise to benefit entitlements.

However, I ultimately rely on the PBGC's position that neither § 4044(d)(1) of ERISA nor § 401(a)(2) of the Code by themselves create liabilities for benefits. The only source of liabilities are the accrual and vesting provisions of Title I of ERISA and § 411 of the Code, the benefits required by § 401(a)(11) of the Code, and the terms of the plan itself.

(emphasis added). The majority interprets this provision to allow recoupment of surplus funds only if two conditions are satisfied: (1) if the surplus funds resulted from "actuarial error;" and (2) after the satisfaction of all "benefit rights or contingent rights accrued under the Plan." The majority concludes that Mead fulfilled neither condition and is therefore not entitled to recoup the surplus. I disagree.

As to the first condition found by the majority, I believe that the majority misconstrues the import of the term "actuarial error." In finding that this term "seems to reference computational error from inaccurate statistical assumptions," the majority analyzes this term in a vacuum, deliberately ignoring the term's obvious origins in Treas.Reg. § 1.401-2(b). It seems self-evident that the term "actuarial error" is coterminus with the term "erroneous actuarial computation," especially given the interchangeable use of the two terms by the IRS in Treas.Reg. § 1.401-2(b) and Rev. Rul. 83-52, 1983-1 C.B. 87. As a result, the IRS's interpretation of the concept is highly relevant to, if not dispositive of, any analysis of the Plan.[6] As discussed above, I believe that the term "erroneous actuarial computation" simply means whatever is left over after all vested and contingent obligations are satisfied, unless the surplus is the result of an amendment to the benefit or eligibility provisions of a

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[6] This is the same approach taken by the Sixth Circuit in *International Union, United Auto, and Agric. Implement Workers of America v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir.1984), where the Sixth Circuit, interpreting a plan that used the term "actuarial error." upheld the adoption of the IRS's definition of "actuarial error" in Rev. Rul. 83-52, 1983-1 C.B. 87. *See also Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F.Supp. 257 (D.D.C.1983), *aff'd*, 729 F.2d 863 (D.C.Cir.1984); *In re Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D.Pa.1977), *aff'd*, 582 F.2d 1273 (2d Cir.1978). *See, generally*, 60A Am.Jur.2d § 950 at 619 & n.29 (1988) ("A court may properly adopt the IRS definition of "actuarial error" to interpret the plan provision.").

plan. Applying that definition to the Plan, it is clear that the surplus funds at stake here are the result of "actuarial error" as that term has been defined by IRS and is applicable to the present facts.

As to the second condition, the majority's interpretation of "contingent rights accrued" suffers from the same tunnel-visioned reasoning as its view of "actuarial error." The words comprising the term "contingent rights accrued" have ample meaning under both ERISA and the Code, and the courts should look to these meanings. Such reliance is justified by the fact that the Plan itself apparently invokes ERISA and the Code by using these words, an invocation that the majority concedes by noting that "[t]he terms of the Plan were written in light of the regulation," i.e., Treas.Reg. § 1.401-2(b). The Plan's intent to borrow the definitions of "contingent" and "accrued" (as well as "actuarial error") is bolstered by the Plan's total failure to define these terms.

Accordingly, there is no doubt that each of the plaintiffs' rights to unreduced early retirement benefits are contingent on attaining the age of 62. But it is apparent that these rights did not accrue in the manner that normal retirement benefits did as Section II of the majority's opinion explains. As a result, the plaintiffs' rights to contingent early retirement benefits had not yet accrued under the Plan. Therefore, I believe that Mead satisfied both conditions set in the Plan and is entitled to recoup the residual assets.

But the majority bypasses ERISA and the Code, declining to apply what it felt was "the technical ERISA concept of 'accrued benefits.'" Instead, the majority claims that a "post-termination contingent 'accrued benefit'" is an "oxymoron" and proceeds to disregard the word "accrued" in order to make sense of the Plan. Such a construction of the Plan is clearly improper when ERISA and the Code, and their regulations, make feasible an interpretation that gives meaning to each and

every word in the Plan. For just as a court, "[i]n construing a statute . . . [is] obliged to give effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *see also Thurner Heat Treating Corp. v. N.L.R.B.*, 839 F.2d 1256, 1259 (7th Cir.1988), so must a court interpret the language of a contract, such as the Plan here.

For the above reasons, which I believe are in keeping with the mandate of the Supreme Court, I dissent from Section III of the majority's opinion.

SUPREME COURT OF THE UNITED STATES

[No. 87-1868]

MEAD CORPORATION,
Petitioner

v.

B. E. TILLEY *et al.*

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490 US 714

Argued February 22, 1989. Decided June 5, 1989.

OPINION OF THE COURT

Justice Marshall delivered the opinion of the Court.

Today we decide whether, upon termination of a defined benefit plan, § 4044(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat 1025, as amended, 29 USC § 1344(a) (1982 ed and Supp V), requires a plan administrator to pay plan participants unreduced early retirement benefits provided under the plan before residual assets may revert to an employer.

I

A

Congress enacted ERISA in 1974 in part to prevent plan terminations from depriving employees and their beneficiaries of anticipated benefits. 29 USC § 1001(a). Titles

I and II provide requirements for plan participation, benefit accrual and vesting, and plan funding. Title III contains general administrative provisions. Title IV covers the termination of private pension plans, establishes a system of insurance for benefits provided by such plans, and creates a "body corporate" within the Department of Labor, the Pension Benefit Guaranty Corporation (PBGC), to administer that system. § 1302. The PBGC guarantees certain nonforfeitable benefits provided by qualified defined benefit pension plans. § 1322.[1]

A defined benefit plan is one which sets forth a fixed level of benefits. See § 1002(35). Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets. See Stein, Raiders of the Corporate Pension Plan: The Revision of Excess Plan Assets to the Employer, 5 Am J Tax Policy 117, 121-122, and n 19 (1986).

When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions. 26 USC § 411(d)(3). Title IV of ERISA requires that plan assets be distributed to participants in accordance with the six-tier allocation scheme set forth in § 4044(a), 29 USC § 1344(a). Section 4044(a) provides that plan administrators first distribute nonforfeitable benefits guaranteed by the PBGC, 29 USC §§ 1344 (a)(1)-(4) (1982 ed and Supp V);[2] then "all other

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[1] For purposes of Title IV, a "nonforfeitable benefit" means "a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter." 29 USC § 1301(a)(8).

[2] By assigning the nonforfeitable benefits guaranteed by the PBGC to the first four priority categories, the allocation scheme "protect[s] against evasion of the . . . limits on the [PBGC's] in-

nonforfeitable benefits under the plan," § 1344(a)(5); and finally "all other benefits under the plan," § 1344(a)(6).[3] If the plan assets are not sufficient to cover the benefits in categories 1-4, the PBGC will make up the difference. § 1361. The employer must then reimburse the PBGC for the unfunded benefit liabilities. § 1362. If funds remain after "all liabilities of the plan to participants and their beneficiaries have been satisfied," they may be recouped by the employer. § 1344(d)(1)(A). Similarly, the Internal Revenue Code (Code) conditions favorable tax treatment of the plan on satisfaction of "all liabilities with respect to employees and their beneficiaries under the [plan]" before plan assets may be diverted to others. 26 USC § 401(a)(2).

B

Respondents B. E. Tilley, William L. Crotts, Chrisley H. Reed, J. C. Weddle, and William D. Goode were employees

surance benefits by use of pension fund assets to first pay uninsured benefits." S. Rep. No. 93-383, p. 84 (1973).

[3] Section 4044(a) provides in relevant part:

"Allocation of assets

"(a) Order of priority of participants and beneficiaries

"In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

"(1) First, to that portion of each individual's accured [sic] benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

"(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

"(3) Third, to [benefits that retired workers were receiving or could have received had the workers chosen to retire within the three years immediately prior to plan termination.

"(4) Fourth, to all other benefits guaranteed by the PBGC].

"(5) Fifth, to all other nonforfeitable benefits under the plan.

"(6) Sixth, to all other benefits under the plan."

of the Lynchburg Foundry Company (Foundry), formerly a wholly owned subsidiary of petitioner The Mead Corporation (Mead).[4] The five were covered by the Mead Industrial Products Salaried Retirement Plan (Plan). The Plan was funded entirely by Mead's contributions.

As a single-employer defined benefit plan, the Plan set forth a fixed level of benefits for employees. Plan participants who completed 10 years of service attained a vested right to accrued benefits, that is, those benetfis earned under the Plan. App 30 (Plan, Art I, § 13). These benefits included normal retirement benefits, payable at age 65 and calculated with reference to a participant's earnings and years of service. Id., at 37-41 (Plan, Arts IV, § 1(b), V). At age 55, participants were eligible for early retirement benefits, calculated in the same manner as normal retirement benefits, but reduced by five percent for each year by which a participant's retirement preceded the normal retirement age. Id., at 37, 38-39 (Plan, Arts IV, § 2, V, § 2(a)). A subsidized or unreduced early retirement benefit, i.e., a benefit equal to that payable at age 65, was available to participants who had 30 or more years of service and elected to retire after age 62. Id., at 39 (Plan, Art V § 2(b)). The Plan did not provide for any benefits payable solely upon plan termination.

In 1983, Mead sold Foundry and terminated the Plan.[5] Mead paid unreduced early retirement benefits only to

[4] David H. Wall, another former employee of Mead, was also a party to this action, but he died while the action was pending in the District Court. This Court denied respondents' motion to substitute Richard H. Wall, executor of David H. Wall's estate, for David H. Wall. 488 US 906 (1988).

[5] Mead sought approval of its proposed distribution of plan assets from the PBGC and the Internal Revenue Service (IRS), the two agencies responsible for enforcing ERISA. See 29 USC §§ 1341(a) and (b) (1982 ed, Supp V). The PBGC replied that "[b]ased on the information [Mead] supplied . . ., the assets of this Plan will be sufficient as of [Mead's] proposed date of distribution to discharge

those employees who had met both the age and years of service requirements. At the time Mead terminated the Plan, four respondents had over 30 years of credited service and a fifth had 28. None had reached the age of 62. Thus, each respondent received payment equal to the present value, determined as of the date of distribution, of the normal retirement benefit to which he would have been entitled had he retired at age 65.[6] Had Mead paid the present value of the unreduced early retirement benefits, each respondent would have received on average $9,000 more. App to Brief for Respondents 1. After Mead finished distributing plan assets to plan participants, nearly $11 million remained in the Plan's fund. Mead recouped this money pursuant to Article XIII, § 4(f), of the Plan. App 63.[7]

In 1984, respondents filed suit in the Circuit Court of the City of Radford, Virginia, alleging, inter alia, that the failure to pay the present value of the unreduced early retirement benefits violated ERISA, 29 USC §§ 1103(c), 1104(a)(1)(A), 1106(b), and 1344. Mead removed the case to the United States District Court for the Western District of Virginia. The District Court granted sum-

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when due all obligations of the Plan with respect to guaranteed benefits." App to Pet for Cert 34a. The IRS issued a determination letter which stated that Mead's proposed plan termination would "not adversely affect its qualification for Federal tax purposes" as long as plan assets were not "returned to [Mead] before the plan's liabilities to all plan participants are satisfied." Id., at 30a-31a.

[6] Each of the plaintiffs elected to receive his benefits in a lump sum rather than as an annuity. Tilley received $87,108.74; Wall $65,360.80; Crotts $87,552.03; Reed $69,882.45; Weddle $50,800.35; and Goode $83,923.93.

[7] Section 4(f) of the Plan provides, in relevant part:

"Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan . . ., and after distribution of any released reserves . . . shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead]." App 63.

mary judgment in favor of Mead, concluding that "[t]he Plan's language, the legislative history, and the case law in the fourth circuit . . . clearly demonstrate that early retirement benefits are not 'accrued benefits' under ERISA." Civ Action No. 84-0751 (WD Va, Apr. 18, 1986). It therefore held that respondents were not entitled to additional sums under the Plan and that the assets remaining in the fund could revert to Mead pursuant to 29 USC § 1344(d)(1) and Article XIII, § 4(f), of the Plan.

The Court of Appeals for the Fourth Circuit reversed. 815 F2d 989 (1987). Adopting the reasoning of the Court of Appeals for the Second Circuit in Amato v Western Union Int'l, Inc. 773 F2d 1402 (1985) cert dism'd, 474 US 1113 (1986), the court concluded that before plan assets may revert to an employer, § 4044(a)(6) requires payment of early retirement benefits to plan participants "even if those benefits were not accrued at the time of termination." 815 F2d, at 991. That conclusion, the court stated, was dictated by the language of the statute, its legislative history, and agency interpretation. Id., at 992. Finally, the court provided a formula for determining respondents' damages and specified that the money should be paid in a lump sum.

Because the question decided by the Court of Appeals for the Fourth Circuit is an important one over which the Courts of Appeals have differed,[8] we granted certiorari. 488 US 815 (1988). We now reverse.

II

Respondents concede that, at the time the Plan was terminated, they had not satisfied both the age and service

[8] See Ashenbaugh v Crucible Inc. 1975 Salaried Retirement Plan, 854 F2d 1516, 1529 (CA3 1988), cert pending, No. 88-897; Blessitt v Retirement Plan for Employees of Dixie Engine Co. 848 F2d 1164, 1178-1179 (CA11 1988) (en banc); Amato v Western Union Int'l, Inc. 773 F2d 1402, 1415-1416 (CA2 1985), cert dism'd, 474 US 1113 (1986).

requirements for unreduced early retirement benefits. Nevertheless, they claim that they are entitled to such benefits because, in their view, contingent early retirement benefits, even if unaccrued, are "benefits under the plan" under category 6, § 4044(a)(6), and therefore must be distributed before the employer can recoup any residual plan assets. Brief for Respondents 4.

We note preliminarily that the PBGC has flatly rejected respondents' argument. In the PBGC's view, § 4044(a) "does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA." Brief for PBGC as Amicus Curiae 9. The PBGC consistently has expressed this view in Opinion Letters addressing proposed plan terminations. See, e.g., PBGC Opinion Letters Nos. 87-11 (Oct. 22, 1987); 86-5 (Mar. 6, 1986); 86-1 (Jan. 15, 1986). The Department of Labor and the IRS, the other agencies responsible for administering ERISA, agree that category 6 is limited to benefits created elsewhere. See PBGC, IRS, and Labor Department Guidelines on Asset Reversions, 11 BPR 724 (1984).

When we interpret a statute construed by the administering agency, we ask first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; . . . [but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v Natural Resources Defense Council, 467 US 837, 842-843 (1984); see also INS v Cardoza-Fonseca, 480 US 421, 446-448 (1987). Thus, we turn first to the language of the statute. See, e.g., Blum v Stenson, 465 US 886, 896 (1984); Consumer Product Safety Comm'n v GTE Sylvania, Inc., 447 US 102, 108 (1980); Nachman Corp. v Pension Benefit Guaranty Corporation, 446 US 359, 373-374 (1980). Sec-

tion 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6)—"benefits *under the plan*"—can refer only to the allocation of benefits provided by the terms of the terminated plan. The limited function of § 4044(a) as an allocation mechanism is made clear by its introductory language, which reads: "In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order." Finally, any possible ambiguity is resolved against respondents by the title of § 4044(a)—"[a]llocation of assets." FTC v Mandel Bros., Inc., 359 US 385, 388-389 (1959).

That § 4044(a) is a distribution mechanism and not a source for new entitlements also is illustrated by the structure of the statute. Title I of ERISA sets forth elaborate provisions to determine an employee's rights to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains § 4044(a), simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I.

To counter the plain language and clear structure of the statute, respondents rely heavily on legislative history. They contend that Congress' failure to include in category 6 the word "accrued," which appeared in a House version of the statute but did not survive the Conference Committee amendments, evinces an intent to require the provision of unaccrued as well as accrued benefits. We disagree. We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because "mute intermediate legislative maneuvers" are not reliable indicators of congressional intent. Trailmobile Co. v Whirls, 331 US 40, 61 (1947); see also Drummond Coal Co. v Watt, 735 F2d 469, 474 (CA11 1984). There

is simply nothing in the legislative history suggesting that Congress intended § 4044(a) to be a source of benefit entitlements rather than an allocation scheme. Neither the House nor the Senate bill provided for allocation of assets on plan termination to benefits that were not created elsewhere.[9] Because the Conference Committee discussed fully the areas where ERISA altered prior law or where the final version of the statute differed from the predecessor bills,[10] it is reasonable to assume that had the

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[9] The final allocation scheme in the House bill consisted of four categories: (1) employee contributions; (2) present value of nonforfeitable benefits in pay status or for which a participant qualified on the date of plan termination; (3) present value of other nonforfeitable benefits; and (4) present value of "accrued benefit[s]" not payable under higher priority categories. HR 2, 93d Cong, 2d Sess, §§ 112(b)(1)-(b)(4) (1974) (as passed by the House on February 28, 1974), reprinted in 3 Legislative History, Employee Retirement Income Security Act (Committee Print compiled for the Senate Committee on Labor), 3957-3958 (1976) (Legislative History). If any assets remained after the satisfaction of these liabilities, the House bill provided for allocation of assets first to investment earnings on employee contributions and then to benefits payable solely upon plan termination. Only then could any remaining assets be recouped §§ 112(d)(1)-(d)(3).

Although the Senate amendment to HR 2 provided for a much simpler allocation scheme, it too was limited to benefits required by the plan or by another ERISA provision: (1) voluntary employee contributions; (2) mandatory employee contributions; (3) benefits in pay status for at least three years; and (4) all other benefits guaranteed by the PBGC. HR 2, 93d Cong, 2d Sess, § 444 (1974) (as passed by the Senate on March 4, 1974), reprinted in 3 Legislative History 3720-3721. The Conference Committee adopted an allocation scheme proposed by the Administration which "combine[d] the best features of the House and Senate bills." Administration Recommendations to the House and Senate Conferees on HR 2 to Provide for Pension Reform 60 (April 1974), reprinted in 3 Legislative History 5107. See also HR Conf Rep No. 93-1280, p 375 (1974), reprinted in 3 Legislative History 4277, 4542.

[10] See, e.g., HR Conf Rep No. 93-1280, pp 268-282 (vesting), reprinted in 3 Legislative History 4535-4549; id., at 306-323 (prohibited transactions), reprinted in 3 Legislative History 4573-4590; id., at 355-356, (salary reduction plans), reprinted in 3 Legislative History 4622-4623.

Conference Committee intended to make § 4044(a) a source of benefit entitlements, it would have discussed the change in the Conference Report.

Respondents offer an alternative statutory argument. They suggest that because all accrued benefits vest upon plan termination pursuant to 26 USC § 411(d)(3), they are nonforfeitable benefits which fall within category 5 of the allocation scheme. Thus, they argue, if category 6 did not cover forfeitable benefits such as the contingent early retirement benefits at issue here, it would serve no purpose.

Respondents are mistaken. The PBGC has consistently maintained that, for purposes of its guarantee and of asset allocation under § 4044(a), the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination. See 29 CFR §§ 2613.6(b) and 2618.2 (1987) ("[B]enefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable"). Soon after the enactment of ERISA, the PBGC stated that "priority category 6 will contain the value of accrued forfeitable benefits of a participant." 40 Fed Reg 51370 (1975). Thus, according to the PBGC, category 6 provides for the allocation of benefits that are forfeitable before plan termination as well as benefits provided under the plan for payment solely upon plan termination. See 29 CFR § 2618.16 (1987). Respondents have failed to persuade us that the PBGC's views are unreasonable. On the contrary, it is respondents' interpretation which cannot be squared with the statute. For if category 5 included benefits that were forfeitable before plan termination as well as those that were nonforfeitable, there would be no guarantee that nonforfeitable benefits would be paid before forfeitable benefits in cases where plan assets are insufficient to cover both. This result would contravene the clear directive of the allocation scheme to give priority to nonforfeitable benefits.

III

We hold that § 4044(a)(6) does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA. Because the Court of Appeals relied exclusively on § 4044(a)(6) as the grounds for respondents' entitlement to unreduced retirement benefits upon plan termination, we reverse that judgment. Respondents, however, offer two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: first, unreduced early retirement benefits may qualify as "accrued benefits" under ERISA; and, second, unreduced early retirement benefits may be "liabilities" within the meaning of § 4044(d)(1)(A), 29 USC § 1344(d)(1)(A). Because the Court of Appeals concluded that § 4044(a)(6) was a source of entitlement for unaccrued benefits, it did not reach these questions. We therefore remand for a determination whether respondents are entitled to damages on the basis of either of these alternative theories. In deciding these issues, the Court of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to "embar[k] upon a voyage without a compass." Ford Motor Credit Co. v Milhollin, 444 US 555, 568 (1980).[11]

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[11] Although the parties and several amici curiae have discussed these alternative theories before this Court, the PBGC and the IRS have not. The PBGC filed a brief as amicus curiae in support of petitioner but specifically stated: "Like the Fourth Circuit, the PBGC expresses no view on the question, arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits." Brief for PBGC as Amicus Curiae 6, n 3. The PBGC brief does not mention the § 4044(d)(1)(A) liabilities issue. The IRS did not file a brief before this Court. We are aware that the United States filed an amicus curiae brief on behalf of the IRS in Amato v Western Union Int'l, Inc. 773 F2d 1402 (CA2 1985), arguing that early retirement benefits are accrued benefits protected from elimina-

Because § 4044(a)(6) is solely an allocation provision, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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tion by plan amendment within the meaning of § 411(d)(6) of the Code. However, the parties and amici curiae disagree whether the IRS still holds this view. Compare Brief for Petitioner 32-33, and n 27 ("Treasury Regulations issued in 1988 confirm the IRS's views that an early retirement subsidy is no part of the participant's accrued benefit") with Brief for American Association of Retired Persons as Amicus Curiae 15 ("[T]he IRS has consistently interpreted the term accrued benefit to extend to the type of early retirement benefits at issue in this case"). Without the views of the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers.

SEPARATE OPINION

Justice Stevens, dissenting.

Perhaps the Court is prudent to await the advice of the Solicitor General before deciding the principal question presented by this case. As presently advised, however, I am persuaded that the Court of Appeals reached the right conclusion, even though I agree with the Court that § 4044 (a) (6) is not itself a source of retirement benefits.

In my opinion the early retirement benefits that respondents seek are contingent liabilities that under both ERISA and the Plan must be satisfied before plan assets revert to the employer. Section 4044(d) of ERISA provides that residual assets of a plan may revert to the employer only if three conditions are satisfied, including that "all liabilities of the plan to participants and their beneficiaries have been satisfied" and "the plan provides for such a distribution in these circumstances." 29 USC § 1344(d). Under the Plan, "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan, . . . shall . . . be returnable to [Mead]." App 63 (Plan, Art XIII, § 4(f)). The term "liabilities," not defined in ERISA itself, is given meaning by a parallel provision in the Internal Revenue Code, 26 USC § 401 (a)(2), which long has been interpreted to require a qualified plan to satisfy both contingent and fixed obligations before any of the plan's assets are diverted to any purpose other than the exclusive benefit of employees and their beneficiaries.[1] Thus, as I understand it, the ques-

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[1] "The term 'liabilities' as used in section 401(a) (2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan. 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute 'liabilities' within the meaning of that term. It must be impossible for the

tion in this case is whether early retirement benefits are contingent liabilities under ERISA or the Plan. The answer, I believe, is yes.

Respondents have far more than an expectancy interest in early retirement benefits. Although the benefits may not be "accrued" in the ERISA sense, respondents have earned them under the Plan by serving over 30 years with Mead, and their right to payment is contingent only upon their election to retire after reaching age 62.[2] Cf. Blessitt v Retirement Plan for Employees of Dixie Engine Co. 848 F2d 1164, 1174, n 22 (CA11 1988) ("[A]n employee is entitled to expect that early retirement provisions in a plan will not be deleted by amendment shortly before the employee qualifies"). Their position is similar to that of those employees whose rights to earned benefits prior to ERISA were frustrated by backloaded accrual schedules and abrupt plan terminations. Respondents' rights have been frustrated by the unilateral action of petitioner. It was precisely to prevent such pre-emptive actions depriving employees with long years of employment of their anticipated retirement benefits that Con-

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employer (or other nonemployee) to recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." Treas Reg § 1.401-2(b)(2), 26 CFR § 1.401-2(b)(2) (1988). In explaining the statutory provisions of the Pension Protection Act, Pub L 100-203, Title IX, §§ 9302-9504, 101 Stat 1330-133 to 1330-382, Congress in 1987 expressed a similar understanding that, under present law, a plan may be voluntarily terminated only "if it has sufficient assets to pay all benefit commitments under the plan" and that all benefits include "all fixed and contingent liabilities to plan participants and beneficiaries." HR Conf Rep No. 100-495, pp 879, 884 (1987).

[2] The Plan provides:

"(b) If a participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits." App. 39 (Plan, Art V, § 2(b)).

gress passed ERISA. See Nachman Corp. v Pension Benefit Guaranty Corporation, 446 US 359, 374-375 (1980). Petitioner was required both by IRS rulings and by prudent actuarial practice to accumulate the funds necessary to pay early retirement benefits.[3] It is reasonable to require it to take account of the contingent rights to those benefits of employees who have satisfied the years of service requirement. I would construe contingent rights or liabilities to include respondents' rights to early retirement benefits upon reaching age 62. Accordingly, I would affirm the judgment of the Court of Appeals.

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[3] Under IRS rulings, if a plan has an early retirement benefit, the plan actuary is required to take the possibility of early retirement into account in deriving reasonable actuarial assumptions. See Rev Rul 78-331, 1978-2 Cum Bull 158; Internal Revenue Service Manual, Actuarial Guidelines Handbook, reprinted in 1 CCH Pension Plan Guide ¶ 3565, Ch 520 (1986). See also R. Osgood, Law of Pensions and Profit-Sharing § 3.4.4, p 96 (1984); 4 S. Young, Pension and Profit-Sharing Plans § 18.06[2], pp 18-121 (1988); 5 id., § 22[B].03[8], p 22B.48.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
Plaintiff-Appellant,

v.

THE MEAD CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (CA-84-0751)

Argued: January 6, 1987 Decided: April 9, 1987

Before WIDENER and CHAPMAN, Circuit Judges, and SIMONS, District Judge for the District of South Carolina, sitting by designation.

Clifford Lee Harrison (Spiers, Stone & Hamrick on brief) for appellant; Charles J. Faruki (Kevin F. O'Neill; Smith & Schnacke; Bernard C. Baldwin, III; Edmunds & Williams on brief) for appellee.

CHAPMAN, Circuit Judge:

The appellants are six former employees of The Mead Corporation. Under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et. seq., they seek relief in the form of early retirement benefits from The Mead Corporation Salaried Retirement Plan (the Plan), which was funded entirely by employer contributions and contained a formula setting forth the specific benefits to be received by the participants upon retirement. Under the Plan, the normal retirement age was sixty-five, but under Article V § 2(b) participants with thirty years of service and of age sixty-two could retire with full benefits. In 1983 Mead terminated the Plan and paid early retirement benefits only to those employees who had met both the age and years of service standards. All other employee retirement benefits were determined actuarially as if they would have retired at age sixty-five. There was ten million dollars left in the fund after the payment of all benefits and this amount was recouped by Mead. The six plaintiffs, except W. L. Crotts,[1] had each worked more than thirty years at the time the Plan was terminated, but none had reached the age of sixty-two. They claim that under 29 U.S.C. § 1344(a), which determines the allocation of plan assets upon plan termination, they are entitled to early retirement benefits and Mead is required to compensate them for loss of these early retirement benefits. We agree and reverse.

I.

In 1968, The Mead Corporation (Mead) acquired Lynchburg Foundry Company (Foundry) at which the appellants were salaried employees. The Foundry became a wholly owned subsidiary of Mead and thereafter Mead established the Plan, which was funded entirely by Mead.

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[1] Plaintiff Crotts was employed July 1, 1955 and had 28 years and one month of company service and was 61 years of age when the Plan was terminated.

The appellants were covered by the Plan under which normal retirement was fixed at age sixty-five. Article V § 2(b) of the Plan allowed unreduced early retirement benefits to those employees covered by the Plan who had attained age sixty-two and had thirty years of service. It provided:

> "If a Participant with thirty (30) or more years of credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to [full benefits]."

In June 1983, Mead announced the Foundry had been sold to another corporation, and the following month, Mead gave notice to all salaried employees (including plaintiffs) that the Plan would be terminated August 1, 1983.

After securing approval from the Pension Benefit Guaranty Corporation, Mead made lump-sum payments to each plaintiff for all benefits Mead determined were due under the Plan. These benefits were not insubstantial and ranged from $50,800.35 for plaintiff Weddle to $87,552.03 for Mr. Crotts. These lump sum benefits were figured on a retirement age of sixty-five and the plaintiffs contend that the retirement benefits should have been determined as of the early retirement age of sixty-two (62). The difference sought by plaintiffs is determined by figuring the actuarial reduction of about five percent per year from the early retirement date of sixty-two (62) rather than from age sixty-five (65). This difference totals $56,476.92 for the six plaintiffs.

Mead contends that the following agreed facts relieve it from any further responsibility to the six plaintiffs:

(1) The sale of the Foundry did not violate ERISA;

(2) Mead had the right to amend or terminate the Plan at any time;

(3) None of the plaintiffs had attained age sixty-two (62) by the time of Plan termination;

(4) Mead never promised or guaranteed to any of the plaintiffs continued employment lasting until age sixty-two (62);

(5) Plaintiffs had no right to continued employment with Mead after termination of the Plan and sale of the Foundry;

(6) Plaintiffs had no right to continued accrual of benefits after Plan termination;

(7) Each plaintiff conceded that he had no facts to indicate Mead acted in bad faith with regard to the calculation and/or distribution of benefits under the Plan.

The Plan retained ten million dollars in funds after payment of all the benefits (excluding the early retirement benefits). Mead recouped these remaining plan assets.

The district court granted summary judgment in favor of Mead on the grounds that the early retirement benefits were not "accrued benefits" under ERISA because the appellants individually had not reached the requisite age and service-years standard established in the Plan. On appeal, the appellants argue that contingent early retirement benefits are a "benefit" which must be distributed upon plan termination.

II.

When a plan is terminated the order of priority of participants and beneficiaries is set forth in ERISA § 4044 (a), 29 U.S.C. § 1344(a) which provides in part:

> In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . .
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the Plan.

It is obvious from these two sections that there is a difference between "nonforfeitable benefits" and "all other benefits under the Plan". In a persuasive opinion, the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1414-16 (2nd Cir. 1985), held that this "category six" included early retirement benefits, even if those benefits were not accrued at the time of termination. The court pointed to the legislative history applicable to § 4044:

> The Joint Explanatory Statement of the Senate-House Conference Committee on the history of ERISA § 4044 supports appellants' argument that category six is not limited to accrued benefits. H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 5038, 5154-55. The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan," the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

773 F.2d at 1416.

Pension plans are usually submitted to the Internal Revenue Service to be sure that the corporate contributions to such plans are deductible in determining the taxable income of the corporation. The Internal Revenue Code, 26 U.S.C. 401 *et seq.*, sets forth the requirements for qualification of pension plans and Treasury Regulations relating to such plans are found in the Code of Federal Regulations. 29 C.F.R. § 2618.16 (1984) provides:

> "The benefits assigned to priority category 6 with respect to each participant are all of the participant's

> benefits under the plan, whether forfeitable or non-forfeitable."

There is a strong presumption in favor of the validity of Treasury Regulations.

> [E]ver since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.

Bob Jones University v. U.S., 461 U.S. 574, 596 (1983).

Mead argues that our decision in *Sutton v Wierton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984), controls the outcome of this case. In *Sutton*, we held "the accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." 724 F.2d at 410.

We do not find *Sutton* controlling. The present case, unlike *Sutton*, does not involve the question of the employer's right to modify early retirement benefit in an unfunded scheme of pension and severance benefits contained in a collective bargaining agreement. We are faced with the termination of an employer funded, defined pension plan which contains early retirement benefits, which plan was terminated resulting in recoupment by the employer of ten million dollars. The application of category six of ERISA § 4044 is controlling in our case, but it was not relevant to or mentioned in *Sutton*.

It is clear from the language of the statute, the general legislative history and the interpretation given to it by the Internal Revenue Service that the present plaintiffs are entitled to the early retirement benefits they seek.

In determining the amount due to each of the plaintiffs, Mead excluded from consideration early retirement benefits and reduced the amount received by each plaintiff by an amount equal to roughly five percent per year that the individual was in age short of age sixty-five. The plaintiffs, except Crotts, were entitled to have early retirement benefits considered in determining the amount of their lump sum retirement payment. The correct computation of the benefit should have been determined by reducing each plaintiff's benefit from age sixty-two, except Crotts whose benefits would be computed using age sixty-four, since Crotts would not complete thirty years of service until that age. In other words, the early retirement age benefits should be determined by figuring the actuarial reduction of five percent per year from the early retirement age of the plaintiff, rather than from age sixty-five.

We reserve the decision of the district court, and remand for further proceedings consistent with this opnion.

REVERSED AND REMANDED
WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 84-0751

B. E. TILLEY, *et al.*,
Plaintiffs

v.

THE MEAD CORPORATION,
Defendant.

MEMORANDUM OPINION

[Filed Apr. 18, 1986]

By: James C. Turk
Chief U.S. District Judge

This case is presently before the court on cross-motions for summary judgment on the plaintiffs' claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1] The parties have submitted briefs, the court has heard oral argument, and the motions are ripe for decision.

The facts in this case are undisputed. The Pension Plan in issue is a noncontributory, defined benefit plan—one funded entirely by the employer and containing a formula setting forth the specific benefits to be received by the participants upon retirement. Under Art. V, § 2(b) of the Plan, a participant could elect early retirement without any reduction of benefits once he reached both age 62 and thirty (30) or more years of Credited Service.

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[1] By an agreed order filed February 24, 1986, the plaintiffs' common law contract claims and claims for punitive damages were dismissed.

In 1983 Mead, having decided to sell the Lynchburg Foundry Company and to terminate the Plan, gave notice to the plaintiffs that the Plan would be terminated. At the time of termination, none of the plaintiffs had reached age 62.[2] Each plaintiff received lump-sum benefits from the employer at the time the Plan was terminated. The plaintiffs have stated that this action was brought to obtain an increase in the amount or level of the lump-sum benefits.

Section 4(f) of the Plan provides:

> (f) Any surplus remanining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

The plaintiffs argue that the early retirement provision of § 2(b) is a contingent right accrued under the Plan and must, therefore, be paid prior to any surplus being returned to the employer. The Plan's language, the legislative history, and the caselaw in the fourth circuit, however, clearly demonstrate that early retirement benefits are not "accrued benefits" under ERISA.

The Plan provided for an election of early retirement with unreduced benefits once a participant both reached age 62 and had thirty (30) years of Credited Service. Once both of these prerequisities had been met, the participant could, under Art. IV, § 2, elect in writing to exercise his early retirement option.[3] In effect, reaching age 62 and having thirty years of Credited Service were conditions which must be met before a participant could

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[2] It is also undisputed that none of the plaintiffs had reached age 62 by the time the lump-sum payments were actually paid.

[3] It is undisputed that no plaintiff made such a written election.

be said to possess even a contingent benefit of early retirement. At that point the benefit would be contingent upon the written election.

The legislative history of ERISA also supports the argument that the unreduced early retirement benefit was not a benefit accrued under the Plan. Among other things, accrued benefits under ERISA do not include the value of the right to receive early retirement benefits. *See* H.R. Conf. Report No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Ad. News 5038, 5054.

The United States Court of Appeals for the Fourth Circuit in *Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1983), *cert. denied* —— U.S. ——, 104 S. Ct. 2387 (1984) held that the early retirement benefits at issue were not accrued benefits and, therefore, were not nonforfeitable. The fourth circuit's reasoning in *Sutton* was followed by the third circuit in *Bencivenga v. Western Pennsylvania Teamsters*, 763 F.2d 574 (3d Cir. 1985), and *Viggiano v. Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276 (3d Cir. 1984).

The court, having carefully considered the language of the Plan, the legislative history, and the fourth circuit's opinion in *Sutton*, finds that the § 2(b) provision for unreduced early retirement benefits is not a contingent right accrued under the plan as to these plaintiffs.[4] Therefore, the plaintiffs are not entitled to any additional sums under the plan.

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[4] The court notes that Congress has amended ERISA § 204(g), 29 U.S.C. § 1054(g), to include early retirement benefits within its accrued benefits protection for plan years beginning after December 31, 1984. Retirement Equity Act, § 301(a)(2), Pub.L.No. 98-397, 98 Stat. 1450-51 (1984). The court further notes, however, that the amendment does not apply to plan years before January 1, 1985.

The plaintiffs also point to the portion of § 4(f) which states that "Any surplus remaining in the Retirement Fund, due to actuarial error, . . . shall, . . . be returnable to the respective Employing Company . . ." The plaintiffs argue that since the surplus was not the result of any actuarial error, as that term is commonly used, then the employer is not entitled to recover the surplus. The argument appears to be that if the surplus cannot be returned to the employer, it should be allocated among the participants in the plan. This argument, however, is without merit for many reasons.

Since the Plan in question was a defined benefit plan, the participants are not entitled to a share of the trust fund. Once the participant's defined benefits have been paid, any surplus from overfunding must be returned to the employer. *See Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980). Two sound underlying policies support this rule. First, ERISA is designed to protect only those benefits which have become vested. *Dhayer v. Wierton Steel Division of National Steel Corporation*, 571 F. Supp. 316 (N.D. W.Va.), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied* 104 S. Ct. 2387 (1984). It is not designed to provide participants with a windfall due to the employer's error in overfunding the Plan in an attempt to keep it on a sound financial basis. *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd mem.* 582 F.2d 1273 (3d Cir. 1978). Second, the rule will serve to encourage employers to keep the funds fully funded under ERISA guidelines in that they will not be penalized for overfunding in an "abundance of caution." *Id.*

Furthermore, § 4(f) does not, as the plaintiffs contend, provide that only surplus remaining due to actuarial error is returnable to the employer. In fact, ERISA specifically provides at 29 U.S.C. § 1344(d)(1) that residual funds may revert to the employer when:

(a) the plan's liabilities to participants have been satisfied;

(b) the distribution does not contravene any provision of the law; and

(c) the plan provides for such a distribution in these circumstances.

The plaintiffs have failed to show specific facts demonstrating that these requirements have not been met.

Most fatal to the plaintiffs' argument is that the definition of "actuarial error" as it applies to ERISA cases actually includes overfunding. The Internal Revenue Service's definition states that "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error . . ." Rev. Rul. 83-52, 1983-1 C.B. 87.[5] The sixth circuit in *International Uunion, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dyneer Corporation*, 747 F.2d 335 (6th Cir. 1984) upheld the application of the IRS definition to ERISA cases, finding that when liabilities have been discharged, the remaining pension plan assets may be considered "surplus arising from actuarial error." Indeed, a plan's overfunding may arise from actuarial error "because actual requirements differ from expected requirements," Treas. Reg. § 1.401-2(b)(1), or even because of intentional overfunding, *Bryant v. International Fruit Products Company*, 604 F. Supp. 890 (S.D. Ohio 1985). Applying the broad IRS definition in this case, the court finds that the surplus did in fact arise from actuarial error.[6] It is, therefore, returnable to the employer.

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[5] Rev. Rul. 83-52 has been modified and superseded by Rev. Rul. 85-6, 1985-1 C.B. 133 to meet the new requirements of § 301 of the Retirement Equity Act of 1984 as discussed *supra* at fn. 4.

[6] The plaintiff places much weight on the defendant's "admission" at oral argument that the surplus was not the result of actuarial error. This amounts to little more than quibbling over semantics. The defendant's statement that there were no actuarial errors made

Based on the foregoing, the court finds that the plaintiffs are not entitled to any sums in addition to the lump-sum benefits which they have already received. The court further finds that the surplus remaining in the fund is returnable to the employer pursuant to the applicable ERISA provision, 29 U.S.C. § 1344(d)(1), and § 4(f) of the Plan. Therefore, the plaintiffs' motion for summary judgment should be DENIED and the defendant's motion for summary judgment should be GRANTED. An order consistent with the memorandum opinion shall be entered this day.

DATED: This 18th day of April, 1986.

/s/ James C. Turk
Chief U.S. District Judge

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in the calculation of the plaintiffs' lump-sum benefits merely recognizes that the correct discount rate was used to calculate the benefits. The defendant did not state that there was no "actuarial error" as used as a term of art.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

TILLEY

v.

THE MEAD CORPORATION

MANDATE

[Filed June 12, 1991]

The judgment of this court dated 2/26/91 takes effect today.

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
Plaintiffs-Appellants

v.

THE MEAD CORPORATION,
Defendant-Appellee

AMERICAN SOCIETY OF PENSION ACTUARIES; PENSION BENEFIT GUARANTY CORP,
Amici Curiae

THE AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES,
Amici Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed June 5, 1991]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Chapman voted to rehear the case. Judge Widener and Judge Murnaghan voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judge Russell, Judge Chapman, Judge Wilkinson, Judge Wilkins and Judge Niemeyer voted to rehear the case in banc; and Chief Judge Ervin, Judge Widener, Judge Hall, Judge Phillips, Judge Sprouse and Judge Murnaghan voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
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Amici Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed May 28, 1991]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener. Judge Chapman dissents.

For the Court,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
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Amici Curiae

ORDER

[Filed May 28, 1991]

Appellee, Mead Corporation, has filed a motion for leave to file reply memorandum in support of petition for rehearing and suggestion for rehearing in banc.

The Court grants the motion to file reply memorandum.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Widener and Judge Chapman.

For the Court - By Direction

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS, JR.; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE,
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Amici Curiae

THE AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES,
Amici Curiae

ORDER

[Filed May 30, 1991]

For reasons appearing to the Court;

The Court's order of May 28, 1991, denying appellee's petition for rehearing and suggestion for rehearing in banc is hereby withdrawn.

Entered at the direction of Judge Murnaghan.

For the Court,

/s/ John M. Greacen
Clerk

ERISA §§ 4044(a), (d)(1), 29 U.S.C. §§ 1344(a), (d)(1)

Allocation of Assets.

(a) In the case of the termination of a defined benefit the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022(b)(5)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(6) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * *

(d)(1) Any residual assets of a plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) The distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

Code § 401(a)(2), 26 U.S.C. § 401(a)(2)

Qualified Pension, Profit Sharing, and Stock Bonus Plans.

(a) Requirements for Qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination);

Treas. Reg. § 1.401-2

Impossibility of Diversion Under the Trust Instrument.

(a) *In general.* (1) Under section 401(a)(2) a trust is not qualified unless under the trust instrument it is impossible (in the taxable year and at any time thereafter before the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. This section does not apply to funds of the trust which are allocated to provide medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14. For the rules prohibiting diversion of such funds and the requirement of reversion to the employer after satisfaction of all liabilities under the medical benefits account, see paragraph (c) (4) and (5) of § 1.401-14. For rules permitting reversion to the employer of amounts held in a section 415 suspense account, see § 1.401(a)-2(b).

(2) As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the non-exempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

(3) As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

(b) *Meaning of "liabilities"*. (1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of \$1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found that \$950,000 will satisfy all of the liabilities under the plan. The surplus of \$50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This \$50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation. If, however, the surplus of \$50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the \$50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.

(2) The term "liabilities" as used in section 401(a)(2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a

trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other non employee) to recover any amounts other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect, irrespective of whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

Rev. Rul. 83-52, 1983-1 C.B. 87

PURPOSE

The purpose of this revenue ruling is to reconsider the position in Rev. Rul. 71-152, 1971-1 C.B. 126 and restate the position in Rev. Rul. 73-55, 1973-1 C.B. 196 under current law in view of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 1974-3 C.B. 1.

ISSUE

The issue involves the determination of the amount that may be returned to an employer upon the termination of a defined benefit plan in accordance with the nondiversion requirement of section 401(a)(2) of the Internal Revenue Code.

FACTS

A defined benefit pension plan that is not a multiemployer plan described in section 414(f) of the Code was terminated. The liabilities under the plan were discharged by an immediate distribution in cash to each participant of an amount equal to the present value of the participant's total benefits (whether or not nonforfeitable). The present values were determined on a termination basis in accordance with 29 C.F.R. section 2619.26 (1981) of the regulations published by the Pension Benefit Guaranty Corporation (PBGC) under Title IV of ERISA. The assets remaining after all distributions to the participants had been made were returned to the employer.

LAW, ANALYSIS AND HOLDING

Section 401(a)(2) of the Code and section 1.401-2 of the Income Tax Regulations provide that plan funds must not be used for purposes other than the exclusive benefit of employees or their beneficiaries prior to the termination of the plan and the satisfaction of all liabilities with respect to those individuals. Section 1.401-2(b)(2) provides that the liabilities that must be satisfied include both fixed (those nonforfeitable prior to termination) and contingent (those not nonforfeitable prior to termination) liabilities. After satisfaction of those liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error.

Rev. Rul. 71-152 held that if a single payment were made at termination to discharge all liabilities of the plan, the amount of the payment must be based on assumptions no less conservative than those used in determining costs during the previous life of the plan.

Title IV of ERISA authorizes the PBGC to make a determination as to whether a terminating pension plan covered by Title IV has sufficient assets to pay all guaranteed benefits provided under the plan. Regulations pub-

lished by the PBGC under 29 CFR Part 2619 provide rules for determining the present value of benefits for certain terminating plans.

For purposes of section 1.401-2(b)(2), the valuation of benefits as permitted under Title IV may be used in determining whether there is any surplus due to an actuarial error. Therefore, after cash distributions have been made to the participants in this plan in amounts equal to the present value (determined as described above) of their total benefits, any remaining assets (i.e., those resulting from actuarial error) may revert to the employer without causing a violation of the non-diversion rule of section 1.401-2 of the regulations.

Similarly, when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from an insurance company which provides the benefits with respect to individuals for whom the liabilities are determined, the remaining assets may be considered surplus arising from actuarial error and revert to the employer.

This revenue ruling does not consider whether the return of assets to the employer satisfies the requirements of regulations published by the PBGC under 29 CFR Part 2618 Subpart C.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 71-152 is revoked. Rev. Rul. 73-55 is superseded because the position stated therein is restated under current law in this revenue ruling.

THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

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THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

ARTICLE I

DEFINITIONS

The following words and phrases, when used in this Plan, unless the context clearly indicates otherwise, shall have the following meanings:

Section 1. Plan. The Mead Industrial Products Salaried Retirement Plan, the terms of which are herein set forth, revised effective as of January 1, 1976, and as it may be amended from time to time. This Plan amends, and continues as so amended, the Woodward Company Salaried Employees' Retirement Income Plan, which first became effective as of January 1, 1968, and all other Pre-existing Plans.

Section 2. Effective Date. January 1, 1976.

Section 3. Pre-existing Plan. Any retirement plan or profit sharing plan of an Employing Company or a Related Employer in effect immediately prior to the Effective Date, as to any group or unit of employees.

Section 4. Corporation. The Mead Corporation, an Ohio corporation.

Section 5. Board of Directors. The Board of Directors of the Corporation.

Section 6. Employing Company. The Mead Industrial Products Division, any subsidiary, division or company affiliated with The Mead Corporation which may, from time to time, be designated as an Employing Company by the Corporate Benefits Committee, and which shall have adopted the Plan by such resolutions and certifications, by the obtaining of such consents from trustees, commit-

tees and others and by such other steps as are necessary effectively to adopt this Plan or a Pre-existing Plan.

Section 7. Related Employer. Any division, firm or corporation, other than an Employing Company, in which an Employing Company or Companies own a substantial interest and which has been determined by the Administrative Committee to be a Related Employer.

Section 8. Employee. A regular, full-time employee of an Employing Company, wherever employed, as determined by the Employing Company under its normal practices, who is not accruing Credited Service under any other retirement plan to which the Corporation makes contributions; a former employee of an Employing Company, who has been transferred to a Related Employer, unless the transferred employee shall waive his rights to future service benefits under the Plan; or a person who is on Approved Absence and who was such an employee immediately prior to such Approved Absence.

Section 9. Approved Absence. Absence of an Employee (i) authorized or approved by his Employing Company, or (ii) while in the employ of a Related Employer pursuant to transfer from an Employing Company, or (iii) during layoff or furlough while recall rights continue (as determined in accordance with the normal practices of his Employing Company); or (iv) who returns to employment within twelve (12) months of his termination of service; (v) for the period of the absence of an Employee due to service with the armed services of the United States, expiring concurrently with reemployment or with the expiration of any reemployment right provided by law, whichever is the earlier.

Section 10. Participant. An Employee who has met all of the requirements of this Plan, has become included in this Plan as provided in Article II and who continues to have rights or contingent rights to benefits payable under this Plan.

Section 11. Earnings.

(a) *For Years After December 31, 1975:*

The amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Gifts.

(ii) Credits, awards and payments under any incentive or bonus plan, except as otherwise determined by the Administrative Committee.

(iii) Deferred compensation.

(iv) Special payment authorized by the Directors.

(b) *For Years Prior to January 1, 1976:*

The basic compensation rate paid to a Participant by an Employing Company, or a Related Employer, on November 1st of the preceding plan year, excluding all payments for overtime, bonuses, and other forms of premium or special incentive pay, and Company contributions, or the contributions of any Related Employer, to this or any other employee benefit plan. However, Earnings for the purpose of determining benefits for service prior to January 1, 1968 hereunder shall mean a Participant's basic compensation rate as of January 1, 1968.

Section 12. Final-Average Earnings.

(a) *Years Prior to January 1, 1976.*

The average annual Earnings of a Participant during the five (5) consecutive calendar years in which his Earnings have been highest, selected from the last ten (10) or less years of his continuous employment as a Participant with an Employing Company or a Related Employer before January 1, 1976.

(b) *For Minimum Retirement Income.*

For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with an Employing Company or a Related Employer before his early or normal retirement date or date of termination of employment with a vested benefit.

(c) *Determination.*

In the event that an Employee has less than five (5) years of such continuous employment, the Final Average Earnings shall be the average of all complete calendar years. For the purposes of Section 12(a) herein, in event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

Section 13. Vesting Date. The date on which a Participant shall have completed at least ten (10) years of Qualifying Service.

Section 14. Credited Interest. Interest credited under the pre-existing plan and continued after the effective date pursuant to the terms of the pre-existing plan as may be determined from time to time by the Corporate Benefits Committee.

Section 15. Primary Social Security Benefit. The primary insurance amount to which a retired Employee would be entitled, if he made timely and proper application and if he did not engage in disqualifying employment under the Federal Social Security Act, as projected to the Employee's Normal Retirement date and computed as though the employee had been covered by the Federal Social Security Act throughout his service with an Employing Company.

Section 16. Totally and Permanently Disabled. Disabled as a result of demonstrable injury or disease which will permanently, continuously and wholly prevent the Participant from engaging in any occupation or performing any work for remuneration or profit; provided that this term shall not include any injury or disease which (i) was contracted, suffered or incurred while the Participant was engaged in, or resulted from his having engaged in, a criminal enterprise, or (ii) was intentionally self-inflicted, or (iii) arose out of service in the armed forces of any country, or (iv) arose as a result of or while working for an employer other than an Employing Company or a Related Employer.

Section 17. Actuary. An independent qualified actuary, who is a member of the Society of Actuaries, or a firm of independent actuaries at least one of whose actuaries is a member of the Society of Actuaries, selected by the Administrative Committee. In addition, commencing January 1, 1976, it means an Actuary enrolled under Title III, Subtitle C of the Employee Retirement Income Security Act of 1974.

Section 18. Administrative Committee. The Administrative Committee provided for in Article XI of this Plan.

Section 19. Corporate Benefits Committee. The Mead Corporate Benefits Committee provided for in Article XI of this Plan.

Section 20. Retirement Fund. The fund described in Article XII.

Section 21. Qualifying Service. All service as a regular full-time employee, which shall not have terminated as defined in Section 5 of Article III, including time on an Approved Absence.

For a full-time employee, Qualifying Service shall commence on the initial date of employment of an Employee and shall cease upon termination of employment.

For part-time or seasonal employees, Qualifying Service shall commence on the first day of the first period of twelve (12) consecutive months in which the employee accumulates 1,000 or more Hours of Service. Thereafter, the part-time or seasonal employee shall be treated as a full-time employee.

Section 22. Actuarial Equivalent. A benefit equal in value, as of the effective date of determination to the benefit for which it is substituted, the value of both such benefits being computed on the basis of actuarial assumptions, tables and factors adopted by the Administrative Committee for such use under the Plan on the recommendation of the Actuary.

Section 23. Hour of Service. Each employee will be credited with an hour of service for:

(a) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which the duties are performed; and

(b) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for reasons (such as vacation, sickness or disability) other than for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which payment is made or amounts payable to the employee become due; and

(c) Each hour for which back pay, irrespective of mitigation of damage, has been either awarded or agreed to by the employer. These hours shall be credited to the employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement, or payment was made.

Section 24. Year of Service. A Year of Service shall mean any consecutive period of twelve months.

Section 25. Plan Year. The accounting year of the Corporation, that is the twelve month period ending on December 31 of each year.

ARTICLE II

CLASSES OF BENEFITS PROVIDED; ELIGIBILITY; CONDITIONS TO PARTICIPATION

Section 1. Classes of Benefits Provided. This Plan provides for the payment of:

(a) Retirement benefits to each Participant who at the time of his retirement qualifies for such benefits, as provided in Article IV;

(b) Benefits on disability to certain classes of Participants, as provided in Article VI;

(c) Benefits to certain classes of Participants on death, as provided in Article VII; and

(d) Benefits to certain classes of Participants on termination of service, as provided in Article VIII;

Section 2. Eligibility for Participation.

(a) Each Employee, who shall have been included in a Pre-existing Plan immediately before the Effective Date applicable to such Employee, shall be eligible to be included in this Plan as of such date, and shall automatically be included in this Plan as a Participant as of such date (subject to the provisions of Section 3 of this Article, and the provisions of Article V), unless within 30 days after such effective date (or such other period as shall be determined by the Administrative Committee) he shall notify his Employing Company to the effect that he elects not

to be so included. Any employee who so notifies his Employing Company shall thereafter be eligible to enter this Plan only to the extent that he meets the requirements set forth in Subsection (b) below.

(b) Each person (i) who shall be an Employee, and (ii) who shall have completed at least one year of Qualifying Service on or after the Effective Date applicable to him, shall thereupon be eligible to become a Participant, and shall continue to be eligible so long as he meets such requirements.

(c) Notwithstanding the foregoing paragraphs (a) and (b), any managerial Employee who, because of special arrangements outside of the terms of any retirement plan, shall be deemed by the Corporate Benefits Committee to be ineligible for inclusion in this Plan, shall be excluded from the Plan.

(d) An employee of an Employing Company, who was transferred from a Related Employer, shall be ineligible for inclusion in this Plan, if he continues to accrue Credited Service under the terms of any other qualified retirement plan maintained by the Related Employer.

Section 3. Conditions to Participation. Participation in this Plan by any eligible employee shall be contingent upon receipt by his Employing Company of such consents, proofs of birth, elections, beneficiary designations, and other information as shall be prescribed by the Administrative Committee. For this purpose, any such consents, proofs of birth, elections, beneficiary designations, or other documents or information, previously furnished by an Employee in connection with a Pre-existing Plan, shall be accepted by the Administrative Committee for the purpose of this Plan, if, in its judgment, they are sufficient and proper, and the rights of the Employee are not impaired thereby. Each eligible Employee shall have 30 days, or such additional time as may be determined to be appropriate, from his date of eligibility in which to elect not to become a Participant.

ARTICLE III

CREDITED SERVICE; APPROVED ABSENCE DISABILITY; TERMINATION OF SERVICE

Section 1. Continuous Employment. Continuous employment shall be deemed to be service as an Employee (including service with two or more Employing Companies and service with a Related Employer by a former Employee of an Employing Company and former service with any Related Employer by a current Employee), which shall not have terminated as defined in Section 5 of this Article III.

Section 2. Credited Service. Subject to the succeeding sections of this Article, Credited Service shall be the total number of years and completed months of Past Service and Future Service.

(a) "Past Service" shall be the continuous employment of an Employee prior to January 1, 1976 except that the Past Service of an Employee of the Murray Rubber Division shall commence upon January 1, 1968 or his entry into this Plan, whichever shall occur later.

(b) "Future Service" shall be the continuous employment of an Employee after December 31, 1975 after he becomes eligible for participation in the Plan.

Section 3. Service after Normal Retirement Date. No Qualifying, Past or Future Service shall be credited under this Plan with respect to employment after the attainment of an Employee's Normal Retirement Date.

Section 4. Approved Absence. For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year, after the applicable effective date during the entirety of which an employee is on such Approved Absense and as to which no earnings are payable to the employee shall not be

credited for purposes of this Plan, except that any employee who is on Approved Absence because of service in the armed forces of the United States will receive Credited Service without any Earnings for the period of his service in the armed forces. The Credited Service of any Participant who transfers to a Related Employer shall be preserved only to the extent that it shall not result in any duplicate coverage, as determined in accordance with regulation of the Administrative Committee.

Section 5. Termination of Service. Subject to the provisions of Article VIII continuous employment shall be deemed to be broken, and all Credited Service previously accumulated shall be forfeited (unless otherwise determined in accordance with normal practices of the Employing Company or as provided under Section 9 of Article I and Section 6 of Article III) in the event of:

(a) Voluntary or involuntary separation (unless such separation occurs upon transfer from one Employing Company to another or to a Related Employer, or unless, in a case covered by Section 5 (b) of Article XIII, the Corporation elects to apply the provisions of that Section) or

(b) Failure to return to work on expiration of Approved Absence or discontinuance of disability.

Section 6. Reemployment. Upon the reemployment of a Participant, who was terminated without any vested benefit by an Employing Company or a Related Employer, the Participant shall receive Credited Service (a) for continuous employment prior to his termination of employment, if the period of his break in employment is less than the period of employment prior to the break or (b) for the period of the break in employment, if the Participant is reemployed within the twelve (12) month period subsequent to the date of termination of employment.

Upon the reemployment of a Participant who had terminated with a vested deferred benefit, the Participant

shall receive Credited Service for any year in which he had Earnings.

Section 7. Limitation on Past Service. No Past Service shall be credited to any Employee who has voluntarily failed to participate (or waived his right to participate) in this or a Pre-existing Plan.

ARTICLE IV

RETIREMENT

Section 1. Normal Retirement.

(a) Each Participant who retires in accordance with the provisions of this Section 1 shall thereupon become eligible to receive a normal retirement income payable in an amount as provided in Article V.

(b) The Normal Retirement Date of each Participant shall be the first day of the month coincident with or next following his sixty-fifth (65th) birthday.

(c) Each Participant who shall not have retired early shall be retired automatically on his Normal Retirement Date, except that his active employment with an Employing Company may be continued on a year-to-year or other basis at the request of the Employing Company and with the consent of the Participant and the Administrative Committee, but in no event beyond age sixty-eight (68).

Section 2. Early Retirement. After he attains age fifty-five (55) and until he attains age sixty-five (65), a Participant shall have the right to elect an Early Retirement Date by giving written notice of such Early Retirement Date at least thirty (30) days in advance to his Employing Company, and, in such event, the Participant shall receive a retirement income in an amount determined under Article V, commencing on the first day of the month coincident with or next succeeding such Early Retirement Date.

ARTICLE V

AMOUNT OF RETIREMENT INCOME; EMPLOYEE CONTRIBUTIONS

Section 1. Amount of Retirement Income.

A Participant who retires at or after his normal retirement date shall be entitled to a retirement income for life payable monthly equal to the greater of the amounts specified in Paragraphs (a) or (b) for all years prior to January 1, 1976, plus the amount specified in Paragraph (c) for all years after December 31, 1975, as follows:

(a) An annual amount equal to (i) for years prior to January 1, 1968, for each year of Credited Past Service an amount equal to .75% of the first $6,600.00 of Earnings plus an amount equal to 1.25% of Earnings in excess of $6,600.00 plus (ii) for each year of Credited Service subsequent to December 31, 1967, but prior to January 1, 1976, an amount equal to 1% of the first $6,600.00 of Earnings and an amount equal to 1.5% of Earnings in excess of $6,600.00; or

(b) An annual amount equal to the greater of (i) $60.00 multiplied by years of Credited Past Service up to a maximum of thirty-five (35) years with proportionate allowance for completed months or (ii) an annual amount which, including the Primary Social Security Benefits provided under Section 1(d) of this Article, is equal to 1.25% of Final Average Earnings as defined in Section 12(a) of Article I, as of January 1, 1976 multiplied by years of Credited Past Service, with proportionate allowance for completed months, up to a maximum of thirty-five (35) years.

(c) For years after December 31, 1975, an annual amount equal to 1¼% of total annual Earnings subsequent to December 31, 1975.

(d) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to one and forty-three/one hundredths percent (1.43%) times years of Credited Past Service with proportionate allowance for completed months, up to a maximum of thirty (30) years by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at the date of his retirement or termination of employment.

Section 2. Early Retirement Income.

(a) A Participant who elects an Early Retirement Date shall be entitled to a retirement income for life, payable monthly, in an annual amount which is equal to the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date reduced by one-twelfth (1/12) of five percent (5%) for each month by which his Early Retirement Date precedes the first day of the month coincident with or next following the date on which he attains age sixty-five (65).

(b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

Section 3. Minimum Retirement Income.

(a) The minimum monthly retirement income payable to a Participant (in cases of normal retirement, early retirement or late retirement) shall be the greater of (i) an annual amount which, including a percentage of the Primary Social Security Benefit applicable to him as defined in paragraph (b) of this Section, shall be equal to (A) 1½% of his Final Average Earnings, as defined in Section 12(b) of

Article I, multiplied by the number of years of his Past Service with proportionate allowance for completed months, plus (B) 1-1/2% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Future Service with proportionate allowance for completed months or (ii) an amount equal to twenty dollars ($20.00) per month plus an additional four dollars ($4.00) per month for each full year of Credited Service in excess of five (5) full years of Credited Service.

(b) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to a fraction the numerator of which is the total years of Credited Service of a Participant at his retirement with proportionate allowance for completed months or termination of service and the denominator of which is the greater of (A) thirty (30) years or (B) potential years of Credited Service at Normal Retirement Age with proportionate allowance for completed months times (ii) fifty percent (50%) of the Primary Social Security Benefit to which the employee would be entitled on his Normal Retirement Date, unless the employee has thirty (30) or more Years of Credited Service or was a participant in the pre-existing Murray Rubber Co. Salaried Retirement Plan and has 30 years of continuous employment after the date when he shall have completed one year of continuous employment, and has attained at least age sixty-two (62) in which case the Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be 50% of the actual, annual, reduced, early retirement Primary Social Security Benefit to which the employee would be entitled.

Section 4. Maximum Retirement Income. The maximum retirement income payable to a Participant under this Plan shall not exceed the lesser of (i) Seventy-five Thousand Dollars ($75,000) per year, or such other amount as the Secretary of Labor by appropriate regulation shall determine from time to time, (ii) Seventy-five Percent (75%) of the Participant's average compensation for the highest three consecutive calendar years during which he was a Participant, or (iii) sixty percent (60%) of his Final Average Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article.

Section 5. Relationship to Retirement Income under Pre-existing Plan. The amount of retirement income determined as in Section 1 of this Article V, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any retirement benefit, profit sharing balance or other vested cash interest of a Participant which shall have accrued to the credit of the Participant under any Pre-existing Plans in respect of service prior to becoming included in this Plan, except for former participants in the Murray Rubber Company Salariad Retirement Plan in which case the Pre-existing Plan benefits shall be in addition to the benefits under this Plan.

Section 6. Withdrawal of Contributions. A Participant who has made contributions in accordance with the provisions of this Plan may withdraw his contributions at the time of the termination of his employment and his accrued benefits, will be actuarially reduced in an amount determined under regulations issued from time to time by the Secretary of Labor.

Section 7. Increases in Social Security. The retirement income of retired Participants and their Beneficiaries and terminated employees with vested interests shall not be reduced because of any changes in benefit levels or wage levels under the Social Security Act.

ARTICLE VI

DISABILITY RETIREMENT

Section 1. Disability Retirement Income. If a Participant shall become Totally and Permanently Disabled after the Effective Date applicable to him, he shall be entitled to receive a Disability Retirement Income, payable monthly, based on his Credited Service at the time he became Totally and Permanently Disabled determined as follows:

Years of Credited Service	Monthly Disability Income
10 years or less	$60.00
11 years	66.00
12	72.00
13	78.00
14	84.00
15	90.00
16	96.00
17	102.00
18	108.00
19	114.00
or more years	120.00

Section 2. Determination of Disability. In determining whether or not a Participant is Totally and Permanently Disabled, the Administrative Committee may require such Participant to submit himself to a physical examination at any reasonable time or times by one or more physicians approved by the Administrative Committee. Refusal to submit to any such physical examination shall be deemed to constitute recovery from disability for the purposes of this Plan.

Section 3. Waiver of Disability Income.

(a) A Participant may elect not to receive the Disability Retirement Income provided under this Article. A participant making such election shall, during the effective period of the election, be ineligible to receive the Disability Retirement Income

provided under this Article and shall also be ineligible to receive any form of early retirement income under Section 2 of Article V. If a Participant who has made such an election becomes Totally Disabled he shall be treated for purposes of the Plan as though he continued throughout the period of disability to be actively employed at the same rate of earnings as that rate in effect at the time of his becoming disabled, and shall, upon attaining his normal retirement date, become eligible to receive a normal retirement income in accordance with the provisions of Section 1 of Article V. During the effective period of such election the Participant shall be eligible to make an election of the special joint and survivor annuity set forth in Section 5 of Article IX. "Totally Disabled" means continuously and wholly disabled, as determined by the Administrative Committee, provided, however, that the determination of such disability shall be fully subject to the same procedures as Section 2 of Article VI.

(b) The election described in this Section shall be made by an instrument in writing delivered to the Administrative Committee prior to the Participant's commencing to receive any form of retirement income, and may be revoked by an instrument in writing delivered to the Administrative Committee, but no election or revocation shall have any retroactive effect.

Section 4. Limitations.

(a) The Disability Retirement Income provided in this Article shall be in lieu of all other retirement income, except as expressly otherwise provided in Section 3 of Article X.

(b) In no event shall the Disability Benefit provided under this Article be payable for any period, prior to the Participant's attaining his Normal Retirement Date, in which wages or salary are payable to him from any source.

(c) The Disability Retirement Income provided under this Article shall be payable only so long as the Participant is Totally and Permanently Disabled, unless recovery from disability occurs subsequent to attainment of his Early or Normal Retirement Date, in which case such Disability Retirement Income shall continue for life.

Section 5. Relationship to Disability Income Under Pre-existing Plan. The amount of Disability Retirement Income determined as in Section 1 of this Article VI, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any disability benefit which shall have accrued to the credit of the Participant in respect of service prior to becoming included in this Plan under any Pre-existing Plans.

ARTICLE VII

BENEFITS ON DEATH

Section 1. Death During Active Service. In the event of the death of a Participant prior to termination of service or retirement, there shall be no death benefit payable under this Plan, other than the special election of a joint and survivor annuity under Section 5 of Article IX.

Section 2. Death after Retirement or Termination of Service. In the event of the death of a Participant after his retirement or termination of his service, no death benefit shall be payable under this Plan, except as may be provided by the Participant under an optional form of retirement income.

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE

Section 1. Vested Deferred Retirement Income. A Participant who has reached his Vesting Date, and whose service terminates for any reason other than death or retirement, shall receive a retirement income, commencing at age 65, in an amount determined on the basis of his Credited Service up to the date of his termination of employment.

Section 2. Vested Deferred Early Retirement. A Participant who is entitled to a vested deferred retirement income commencing at age 65, as provided above, may elect to receive instead a reduced retirement income of an Actuarial Equivalent value commencing at an earlier date, but no earlier than age 55.

Section 3. Pre-existing Plan Accounts. If a terminated Participant has an account under any Pre-existing Plan, his right of withdrawal of that account, if any, shall be governed by the terms of the Pre-existing Plan.

Section 4. Application. Application for Vested Deferred Retirement Income must be made to the Administrative Committee by an applicant otherwise eligible therefor not earlier than 90 days prior to the date retirement income is to commence. The monthly retirement benefit shall become payable to such employee after (i) the date retirement income is to commence, and (ii) he shall have filed a timely application for such benefit with the Administrative Committee.

ARTICLE IX

NORMAL AND OPTIONAL FORMS OF RETIREMENT INCOME

Section 1. Normal Form of Retirement Income. The normal form of retirement income payable to a Participant under this Plan shall be an annuity payable monthly for life.

Section 2. Retirement Income for Married Participant. Unless he elects otherwise by written request to the Administrative Committee prior to his Normal or Early Retirement Date, whichever is applicable, a married Participant shall receive a retirement income reduced from the normal form of retirement income. Such retirement income shall be payable during his lifetime, with a survivor's annuity to continue after his death at the rate of 50% of the reduced retirement income to his

spouse at the time benefit payments commence. The amount of the retirement income shall be determined by applying the appropriate Actuarial Equivalent factor to the normal form of retirement income. Such Actuarial Equivalent factor shall be based on the age of the Participant and his spouse.

Section 3. Optional Forms of Retirement Income. In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive an annuity of actuarially equivalent value in any one of the following forms:

(a) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the retired Participant, and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a surviving spouse or other designated beneficiary, during the lifetime of such person after the death of the retired Participant;

(b) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the Participant and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a beneficiary who is a minor lineal descendant until such person attains age 21 if such event occurs after the death of the retired Participant;

(c) A reduced annuity payable during the lifetime of the retired Participant and guaranteed to continue to the retired Participant or to a designated beneficiary or to the estate of the last to die of the retired Participant and the beneficiary, for at least 5, 10 or 15 years (according to the election of the Participant) after the retirement of the Participant regardless of whether the Participant survives such 5, 10 or 15 year period;

(d) A reduced annuity payable during the lifetime of the retired Participant plus a benefit payable on his death in an amount equal to the full actuarial value of such reduced annuity, less any retirement income payments (including any disability payments) made to the Participant prior to his death.

(e) An annuity in an Actuarial Equivalent payable in some other form, excluding all lump sum distributions, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

(f) A reduced annuity payable during the lifetime of the Participant, which shall increase at the rate of Three Percent (3%) per year on the anniversary of the Participant's actual retirement.

(g) Social Security Adjustment Option: A Participant who has retired early under the provisions of Section 2 of Article IV, or an individual beneficiary under a joint and survivor annuity option who becomes entitled before becoming eligible for Social Security benefits to enter upon an annuity payable under this Plan, may elect to receive such benefit in the form of an adjusted annuity payable in a greater amount during the period before becoming eligible for Social Security benefits and a correspondingly reduced amount, actuarially determined, after becoming so eligible, so that the total income, including both the adjusted benefit payable under this Plan and the Primary Social Security Benefit to which such person shall be entitled, shall be as nearly uniform as possible both before and after becoming so eligible.

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant, provided that he may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement;

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant, subject to the additional provisions of Paragraph (i) of this Section 4(a).

(b) Any beneficiary designated under this Article must be a natural person.

(c) To elect a joint and survivor annuity (or to change the beneficiary) a Participant shall designate his beneficiary on a form provided for the purpose, and shall furnish to the Administrative Committee not later than the date on which he shall retire, proof satisfactory to the Administrative Committee of the age of the beneficiary.

(d) The election of an optional form of retirement income shall become effective at his Normal Re-

tirement Date (regardless of whether the Participant continues in active employment after such date), or upon his earlier actual retirement.

(e) A Participant may, in hardship cases subject to the consent of the Administrative Committee, revoke his election of an optional form of retirement income at any time before it shall have become effective as provided in Subsection (d) above.

(f) If a Participant shall have elected an optional form of benefit which provides for designation of a beneficiary and

(i) If his beneficiary shall die before the election becomes effective, the election shall thereupon become void;

(ii) If the Participant shall die before the election becames effective, the election shall thereupon become void and the beneficiary shall not be entitled to an annuity under such option;

(iii) If the Participant shall remain in the active service of an Employing Company or become reemployed by an Employing Company after the date upon which the election becomes effective, his election shall nevertheless continue to be effective, and if the Participant shall die before retiring, his beneficiary shall receive the amount of annuity which would be payable to such beneficiary in accordance with such eleciton, as if such Participant had retired on the date of his death, and if the beneficiary shall die before the Participant shall actually retire, such Participant shall be entitled, after retiring, to receive only the reduced annuity payable to him in accordance with such election;

(iv) If the beneficiary shall die after commencement of the optional annuity, but before the death of the retired Participant, such Par-

ticipant shall continue to receive the reduced annuity payable to him in accordance with such election.

(g) In the election of any optional form of retirement income, the Participant may designate any person or persons, natural or corporate, as trustee or otherwise, as a payee beneficiary, to receive payments of benefits in lieu of payment to the natural person designated as beneficiary.

Section 5. Special Joint and Survivor Annuity. A special election of joint and survivor annuity may be made, as set forth in this paragraph. If such a special election of a joint and survivor annuity shall have been made by a Participant at least one year before his death and he shall die after attainment of age 55 and before attainment of Normal Retirement Date or earlier termination of his employment, for the purpose of this paragraph alone he shall be deemed to have retired early as of the first day of the month coincident with or immediately prior to the date of his death. The election of the joint and survivor annuity shall thereupon become effective and his beneficiary shall be entitled to receive an income based upon the actuarially reduced income to which the Participant would have been entitled upon such early retirement, further reduced in recognition of the substitution of a joint and survivor annuity for an annuity based on the life of the Participant only and further reduced by the cost of the coverage under this Section 5 as provided herein. In the event that a Participant who has made such a special election survives until he retires (whether or not his beneficiary dies before he retires), the retirement income subsquently payable to him shall be reduced actuarially in consideration of the coverage which he shall have received under this provision as follows:

Proportion of Reduced Retirement Income to be Paid to Beneficiary Under Option Elected	Percentage Reduction in Retirement Income of Participant for Each Full Year of Coverage (with Pro Rata Reduction for Completed Months)
½	½ of 1%
⅔	⅔ of 1%
¾	¾ of 1%

This election will be given effect prior to the completion of the one (1) year election period if: (a) Participant dies from accidental causes; (b) a failure to give effect to the election would deprive the survivor of the Participant of an annuity; (c) the election was made before the accident, and (d) the Participant at the time of the accident had arrived at his Early Retirement Date.

ARTICLE X

PAYMENT OF BENEFITS; CLAIMS PROCEDURE

Section 1. Authorization of Payment; Application; Appellate Procedure.

(a) No payments shall be made under this Plan until it shall have been authorized by the Administrative Committee.

(b) All claims for benefits shall be in writing, signed by the Participant or, if applicable, his beneficiary and filed with the Administrative Committee, through a local Plan Representative as appropriate, on forms furnished and approved by the Administrative Committee. The Administrative Committee and the Plan Representative shall follow the following procedure in processing claims:

(i) Advise the Claimant of all his rights under the Plan and assist him in the preparation of the claim;

(ii) If filed through a Plan Representative, the Plan Representative shall forward the exe-

cuted claim within thirty (30) days of receipt of the initial application to the Administrative Committee for its consideration.

(iii) The Administrative Committee shall meet monthly to consider and take action on all claims received since it last met;

(iv) Upon approval of a claim by the Administrative Committee, a member of the Committee shall take prompt action to commence payment of benefits to the Claimant in accordance with the provisions of the Plan.

(c) In the event that any claim is denied by the Administrative Committee, the claimant shall have the right within a period of sixty (60) days from the receipt of notice of denial to appeal such denial to a Panel of three persons, designated by The Corporate Benefits Committee to hear the appeal within sixty (60) days after the date the appeal was filed. The appeal shall be filed in writing with the Administrative Committee.

The Claimant shall be entitled to appear before the Panel in person to present his claim and the Panel shall have the authority to obtain such additional evidence as it deems appropriate under the circumstances to enable it to render a decision.

The decision of the Hearing Panel shall be rendered in writing to the Claimant within seven (7) days of the completion of the hearing and shall be binding upon the Company and the Claimant to the extent permitted by law.

Section 2. Date and Duration of Payment. The retirement income payable under this Plan to a retired Participant shall commence, if he shall then be living, and if in accordance with the provisions of this Plan, as of the first day of the month coincident with or next following the latest of:

(i) The actual retirement date of the Participant, or

(ii) The date on which he shall have filed an application for a retirement income with his Employing Company, or

(iii) The date specified in such application as the date upon which such income shall commence,

and shall be payable to the retired Participant on the first day of each month thereafter during his lifetime provided that any payments under this Section will commence no later than sixty (60) days after the close of the Plan Year in which the following occur, whichever is later:

(i) Participant attains Age 65 or Normal Retirement Age;

(ii) Tenth Anniversary of year in which Participant commenced participation;

(iii) Participant terminates service.

Section 3. Reemployment of a Retired Participant.

(a) Any retirement income payable under this Plan to any retired Participant shall cease no later than the first date of his reemployment by an Employing Company or a Related Employer and shall resume as of the first day of the month coincident with or next following his subsequent retirement, in the amount provided for below.

(b) Upon the reemployment of a retired Participant prior to his attainment of Normal Retirement Date, he shall be eligible to re-enter this Plan.

(c) In any case where the payment of an early retirement income ceases due to reemployment, the amount of the retirement income to be paid on subsequent retirement shall be actuarilly determined, as applicable, on the basis of the increased service, age, contributions (if any), amount of retirement income

paid, and any other factors which are relevant to such a determination.

Section 4. Limitation Regarding Small Payments. In the event that the present value of any retirement income or other benefit provided under this Plan is an amount less than one thousand seven hundred and fifty dollars ($1,750.00), present value may be paid in a lump sum in full discharge of all liability in respect of such retirement income or other benefit under the Plan.

Section 5. Payment to Incompetents. Until the Administrative Committee shall have received written notice that any person entitled to receive any benefit under this Plan is a minor, or is otherwise incompetent, it may authorize payment of such benefit directly to such person, and all liability for the payment thereof shall be discharged upon such payment. If, after receipt of such written notice as to any such person, the Administrative Committee shall receive evidence satisfactory to it that another person or an institution is then maintaining or has custody of such person, and that no guardian, committee or other legal representative of the estate of such person shall have been duly appointed, the Administrative Committee may authorize payment of such benefit to such other person or institution, and the release of such other person or institution shall be a valid and complete discharge for the payment so made.

Section 6. Misstatement in Application for Retirement Income. If any Employee in his application to participate in the Plan or for a retirement income, or in response to any request of his Employing Company or Related Employer for information, makes any statement which is erroneous or omits any material fact or fails before receiving his first payment to correct any information that he previously incorrectly furnished to the Employing Company for its records, his contributions (if any) and the amount of his retirement income shall be adjusted on the basis of the facts, and the amount of any overpayment theretofore made to such Participant shall be

deducted from his next succeeding payments as the Administrative Committee shall direct.

Section 7. Missing Persons. If the Administrative Committee is unable, within five years after any benefit becomes due from the Retirement Fund to a Participant or beneficiary, to authorize payment because the identity or whereabouts of such persons cannot be ascertained, the Administrative Committee may direct that such benefit (which benefit shall in no event be less than the accrued retirement income, if any, earned by the Participant) and all further benefits with respect to such person shall be forfeited, and all liability for the payment thereof shall terminate, provided however, that, in such event, a death benefit shall be paid to the beneficiary or estate of the Participant, as provided for in Article VII, in all respects as though the death of the Participant had occurred on the date when the benefit referred to above would otherwise have been payable.

ARTICLE XI

FIDUCIARY RESPONSIBILITY

The following persons are hereby designated as fiduciaries under the Plan with the respective powers and duties allocated to them:

Section 1.—Plan Administrator.

(a) *Designation.* This Plan shall be administered by an Administrative Committee, which shall be the Plan Administrator, and which shall consist of not less than three persons who shall be appointed from time to time by The Corporate Benefits Committee. Members of the Administrative Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by The Corporate Benefits Committee, no member of the Administrative Committee shall re-

ceive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties of the Administrative Committee.* The Administrative Committee shall have the following powers and duties:

(i) To establish and enforce such rules, regulations and procedures as it shall deem necessary or proper for the efficient administration of the Plan;

(ii) To interpret the Plan, including the supplying of any omissions in accordance with the intent of the Plan, its interpretation thereof in good faith to be final and conclusive upon all persons;

(iii) To decide all questions concerning the Plan and the eligibility of any Employee to become a Participant;

(iv) To compute the amount of benefits which shall be payable to any Participant, retired Participant, or beneficiary in accordance with the provisions of the Plan, and to determine the person or persons to whom such benefits shall be paid;

(v) To authorize or deny the payment of benefits;

(vi) To supervise and direct work of Corporation Personnel and Plan Representatives, in the administration of the Plan including without limitation the following duties:

(A) To prepare and file all reports with Government agencies;

(B) To prepare and distribute booklets, announcements, reports and descriptions of the Plan to employees, as shall be required by law;

(C) To maintain all records relating to the Plan and Trust Fund;

(D) To establish and administer at a local level a uniform claims procedure;

(E) To perform such other duties as shall be necessary to administer the Plan.

(vii) To review and approve the employment of all accountants, actuaries, consultants and attorneys as shall be deemed necessary from time to time, and to receive and evaluate their reports;

(viii) To review bonding and insurance requirements; and

(ix) To delegate in its discretion its powers and duties to administer the Plan to personnel of the Corporation.

provided, however, that the discretion vested in the Administrative Committee shall in all cases be exercised in a manner which is, so far as may be practicable, consistent and uniform as to all Employees similarly situated.

Section 2. Corporate Benefits Committee.

(a) *Designation.* The Corporate Benefits Committee shall be designated from time to time by the Directors and shall consist of not less than five (5) members. Members of the Corporate Benefits Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Directors, no member of the Corporate Benefits Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties.* The Corporate Benefits Committee shall have the following powers and duties:

(i) To terminate the Plan and/or Trust or discontinue contributions;

(ii) To amend or modify the Plan or Trust in whole or in part;

(iii) To appoint Trustees and other Fiduciaries and designate members of the Administrative Committee;

(iv) To determine the amount of contributions necessary to fund the Plan on an actuarially sound basis and to collect and pay all contributions to the Retirement Fund in a timely manner;

(v) To delegate to employees of the Corporation or to the Plan Administrator such additional powers and duties as it shall consider necessary or desirable in the operation of the Plan and Retirement Fund;

(vi) To review periodically all aspects of the Administration of the Plan.

Section 3. Investment Policy Committee.

(a) *Designation.* A Retirement Plan Investment Policy Committee of not less than five (5) persons shall be designated annually by the Corporate Benefits Committee to review the investment of assets in the Trust(s). Members of the Investment Policy Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Corporate Benefits Committee, no member of the Investment Policy Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) *Powers and Duties.* The Investment Policy Committee shall have the following duties and powers:

(i) To develop investment policies and procedures, implement investment programs and monitor designated Trustee and Investment Advisor activities;

(ii) To employ and discharge Investment Advisors and to recommend the selection and/or termination of Trustees or Insurance Companies;

(iii) To receive and evaluate monthly, quarterly and annual reports of the Trustees and Investment Advisors;

(iv) To review investments made by the Trustees and Investment Advisors and other investments held by the Plan(s);

(v) To direct the flow of funds between trusts and allocate the amount of assets to be managed by each Trustee and Investment Advisor;

(vi) To report investment performance to the Corporate Benefits Committee at least once each quarter;

(vii) To supervise and coordinate when so directed by The Corporate Benefits Committee the investment policy for the funds of Pension Plans other than The Mead Industrial Products Salaried Retirement Plan.

Section 4. Trustees.

(a) *Designation.* The Trustees of any Trust Funds under the Plan shall be designated by the Corporate Benefits Committee.

(b) *Duties and Powers.* The Trustees shall have such duties and powers as are set forth in the Trust Agreement executed by the Company and the Trustee to fund benefits under this Plan.

ARTICLE XII

RETIREMENT FUND

Section 1. Retirement Fund.

(a) The Corporation shall maintain a Retirement Fund into which shall be paid the contributions of each Employing Company participating in the Plan and, to the extent there are any, the contributions of each Participant. The Retirement Fund may comprise either a trust fund or trust funds held by a trustee or trustees, a group annuity contract or contracts, including a deposit administration contract or contracts, or any combination thereof.

The contributions of each Employing Company shall be paid at such times, in such amounts, and in such manner as the Corporate Benefits Committee shall determine and as may be necessary to keep the Retirement Fund actuarially sound.

At no time prior to the satisfaction of all liabilities under the Plan with respect to Participants, retired Participants, and beneficiaries, shall any part of the corpus or income of the Retirement Fund be used for, or diverted to, any purpose other than for their exclusive benefit. No person shall have any financial interest in or right to the Retirement Fund or any part thereof, except as expressly provided for in this Plan.

(b) Each Participant or retired Participant or other person who shall claim the right to any payment under the Plan shall be entitled to look only to the Retirement Fund for such payment. No liability for the payment of benefits under the Plan shall be imposed upon the Board of Directors, the Administrative Committee, the Corporate Benefits Committee, the Investment Policy Committee, the Trustees,

the Corporation, an Employing Company or the officers, directors or stockholders of the Corporation.

(c) Forfeitures shall be applied to reduce future contributions to the Retirement Fund and shall not be allocated to increase any benefits of employees.

Section 2. Annual Actuarial Examination. At least once each year, the Corporation shall cause the liabilities of the Plan in respect of retirement incomes and other benefits to be evaluated by an Actuary who shall report to the Corporation as to:

(a) The soundness and solvency of the Retirement Fund in relation to such liabilities;

(b) The amount of the annual contribution by an Employing Company which would be sufficient to provide for currently accruing retirement income and other benefit liabilities; and

(c) The applicable limitations established by law as to the maximum and minimum amount of the contributions (with respect to both past and currently accruing benefits) which may be deducted for federal income tax purposes. An Actuary shall determine, and certify to the Administrative Committee, all actuarial computations necessary to the proper administration of this Plan.

Section 3. Separate Accounts. The Administrative Committee shall maintain, or cause to be maintained, a separate account for each Employing Company participating in the plan showing the value of its contributions to, the value of any funds of a Pre-existing Plan covering its employees included in, its share of earnings or losses in, and payments allocable to its employees from, the Retirement Fund and each separate part of the Retirement Fund.

ARTICLE XIII

MISCELLANEOUS PROVISIONS

Section 1. Non-Alienation of Benefits. No benefit which shall be payable under this Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge by a Participant or a beneficiary or anyone claiming under either of them. If a Participant or a beneficiary or anyone claiming under either of them shall attempt to or shall subject in any manner any benefit which shall be payable under this Plan to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge, his interest in any such benefit shall terminate and the Administrative Committee shall instruct the trustee to hold or apply it to or for the benefit of such person, his spouse, children "or other dependents", or any of them as the Administrative Committee may instruct.

Section 2. Plan Not a Contract of Employment. This Plan shall not be deemed to constitute a contract between any Employee and an Employing Company, or to be a consideration for the employment of any Employee. Nothing in this Plan shall give any Employee the right to be retained in the employ of an Employing Company; all Employees shall remain subject to discharge, discipline or layoff to the same extent as if the Plan had not been put into effect.

Section 3. Limitation Concerning Twenty-five Highest Paid Employees as Required by U.S. Treasury Regulations.

(a) In the event that either this Plan shall be terminated or the full current cost of this Plan shall have not been met during the 10-year period following its Effective Date, then, anything contained in this Plan to the contrary notwithstanding, except as provided by this Section, the following limitations

shall apply to the part of the Retirement Fund contributed by the Employing Companies which may be used for the benefit of any person who on the Effective Date of this Plan shall have been among the twenty-five highest paid Employees, and whose anticipated annual retirement income payable under the Plan on normal retirement exceeds $1,500. Such part shall not exceed the greatest of: (i) $20,000; or (ii) an amount equal to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person if the Pre-existing Plans had been continued without change; or (iii) the sum of (A) an amount equal to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person under the Pre-existing Plans if they had been terminated on the day before the effective date of this revised plan, and (B) an amount equal to 20% of the employee's average regular annual compensation, but not in excess of $10,000, multiplied by the number of years since the Effective date.

(b) If the full current cost of this Plan shall at any time during the 10-year period following its Effective Date not have been met, but the Plan shall not have been terminated, the limited amount of current monthly retirement income allowable to any person under Subsection (a) of this Section 3 shall be increased to the extent necessary to provide the full monthly retirement income otherwise allowable under the Plan, provided, however, that the aggregate of such additional monthly payments in the year then current to all such persons does not exceed the aggregate contributions of the Employing Companies already made under the Plan in the year then current. If the aggregate of such contributions would

be so exceeded, the additional payments to which any person would otherwise be entitled shall be reduced in the proportion that the aggregate of such contributions bears to the aggregate of such additional payments.

(c) If the retirement income of any person shall have been suspended in part in accordance with Subsection (a) of this Section 3 because the full current costs of the Plan shall not then have been met, and if the full current costs thereafter shall have been met, the full amount of the retirement income payable to him shall be resumed and the part of any income which shall have been suspended shall then be paid in full.

(d) In the event that it shall be determined by statute, court decision, ruling by the Internal Revenue Service, or otherwise, that the provisions of this Section 3 are no longer necessary to qualify the Plan under the Internal Revenue Code, this Section 3 shall be ineffective without amendment to the Plan.

Section 4. Modification or Discontinuance of the Plan.

(a) The Corporation expects and intends to maintain this Plan in force indefinitely, but necessarily reserves the right to amend or discontinue the Plan in whole or in part at any time.

(b) At any time and from time to time, the Plan may be amended in whole or in part, or the contributions of an Employing Company may be suspended; provided, however, that no amendment shall be effective unless the Plan as so amended shall, prior to the satisfaction of all liabilities with respect to Participants, retired Participants, and beneficiaries under this Plan, be for the exclusive benefit of such persons.

(c) In case of the complete termination of the Plan (or partial termination as determined by the

United States Department of the Treasury) the assets of the Plan available to provide benefits shall be allocated among Participants and Beneficiaries in the following order:

(i) First, to that portion of each individual's accrued benefit which is derived from the Participant's contributions to the Plan or any vested interests from prior plans.

(ii) Second, in the case of benefits payable as an annuity—

(A) In the case of the benefit of a Participant or Beneficiary which was in pay status as of the beginning of the three-year period ending on the termination date of the Plan, to each such benefit, based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least, the lowest benefit in pay status during such three-year period being considered the benefit in pay status for such period, and

(B) In the case of a Participant's or Beneficiary's benefit (other than a benefit described in Subparagraph (A)) which would have been in pay status as of the beginning of the three-year period; and if his benefits had commenced (in the normal form of annuity under the Plan) as of the beginning of such period, to each such benefit based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least.

(iii) Third—

(A) To all other benefits (if any) of individuals under the Plan, guaranteed under

Title IV of the Employment Retirement Income Security Act of 1974 determined without regard to Section 4022(b)(5), and

(B) To the additional benefits (if any) which would be determined under Subparagraph (A) next preceding if Section 4022 (b)(6) of the Act did not apply; and

applying Section 4021 of the Act for the purposes of this paragraph without regard to Subsection C thereof.

(iv) Fourth—To all other nonforfeitable benefits under the Plan.

(v) Fifth—To all other benefits under the Plan.

(d) For the purposes of Article XIII, Section 4(c):

(i) The amount allocated under any paragraph with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph.

(ii) If the assets available for allocation under any paragraph of Article XIII, Section 4(c) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated prorata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(e) If the Plan is discontinued but the Corporate Benefits Committee further determines that the trust agreement shall be continued pursuant to its terms and the provisions of this Section, no further contributions will thereafter be made by either the Participants or the Employing Companies, but the trust

agreement shall be administered otherwise as though the Plan were in full force and effect, except that no further benefits will accrue after the date of discontinuance. If the trust agreement is subsequently terminated, the trust assets shall then be allocated and distributed in accordance with the procedure set forth in Subsection (c) above.

(f) Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

(g) If this Plan is terminated as to some (but not all) Participants, then the Corporation shall cause the part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the Actuary) to such Participants and their beneficiaries to be segregated, and the assets so segregated shall be applied for such Participants and beneficiaries as provided in paragraphs (c), (d) and (e) of this Section.

(h) Upon the complete discontinuance of contributions hereunder or upon complete termination of the Plan (or partial termination of the Plan as determined by the United States Department of the Treasury) the rights of each Participant (involved in the termination) to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to this account at such time, are nonforfeitable.

Section 5. Effect of Corporate Reorganization, etc.

(a) In the event that the Employing Company shall become a party to any reorganization, merger, consolidation or other corporate readjustment, or shall be dissolved or liquidated, and, as a result thereof, a substantial part of the Employees of the Employing Company shall become the Employees of another corporation, then this Plan shall not be terminated or discontinued in whole or in part as to such Employing Company, and such other corporation or corporations shall, in all respects, be substituted for such Employing Company under this Plan.

(b) In the event that any entity other than the Corporation shall acquire a majority of the outstanding voting stock of the Corporation, or all or substantially all of the assets of the Corporation, or any plant, division or department thereof as a going concern, then, the Corporation, as determined by the Corporate Benefits Committee, may, in lieu of the normal operation of Article VIII or Section 4 of this Article, cause any part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the actuary) to Participants who thereupon become employed (directly or indirectly) by the acquirer and the beneficiaries of such Participants, to be segregated and deposited in a separate fund, which shall thereafter be held subject to this Plan and in such event the acquirer shall be vested with all of the powers vested in the Board of Directors with respect to this Plan as it relates to the acquirer's employees. In such case, this Plan shall not be terminated or discontinued in whole or in part. Alternatively, the Corporate Benefits Committee may terminate this Plan as to such acquired corporation, plant, division or department, in which case the allocable part of the Retirement Fund shall be segregated as provided above and applied as provided in Section 4 of this Article.

(c) In the event that any Employing Company shall be involved in a merger, consolidation, acquisition, reorganization, liquidation, transfer of assets to another Plan or similar transaction, the accrued benefits earned by a Participant prior to the transaction shall not be reduced and shall be equal to or greater than the benefit to which he would have been entitled to receive before the transaction.

Section 6. Effect of Bargaining Agreements. In the event that a bargaining representative of any Participant negotiates an agreement for another retirement plan as to such Participant, such Participant shall, upon his inclusion in such Plan, be deemed to have terminated his service under this Plan.

ARTICLE XIV

PRE-EXISTING PLANS

RESERVED.

ARTICLE XV

GENERAL PROVISIONS

Section 1. Word Headings. The word headings of the sections and paragraphs of this Plan are supplied solely for the purpose of facilitating reference to such sections and paragraphs and shall not, in any way, alter, amend, supplement, subtract from or otherwise change this Plan or any part thereof.

Section 2. Gender and Number. Where applicable, "he", "his", and "him" shall include "she", "hers" and "her", and references in the singular shall include the plural references.

Section 3. Ohio Plan. This Plan shall be construed and enforced according to the laws of the State of Ohio and all provisions shall be administered according to the laws of that State.

Section 4. Separability. Each provision hereof shall be independent of each other provision, and if any provision of this Plan proves to be, or is held by any Court or tribunal, board or authority of competent jurisdiction to be illegal, unenforceable or in conflict with any of the provisions of Section 401 of the Internal Revenue Code, as amended, any other provision of law or the rules and regulations of the Commissioner of Internal Revenue or of the Secretary of the Treasury with respect to qualification of the Plan created herein as a tax-free retirement plan or with respect to deduction of the Corporation's contribution to the Plan in computing its net income for federal tax purposes, such provision shall be disregarded and shall be deemed to be null and void and no part of this Plan, but such invalidation of any such violative provisions shall not otherwise impair or affect this Plan or any of its other provisions provided however, that nothing in this paragraph shall be treated or interpreted so as to work a reversion or diversion of any funds to the Corporation.

IN WITNESS WHEREOF, the undersigned have executed this Plan on this 28th day of December, 1977.

ATTEST:

THE MEAD CORPORATION

/s/ Gordon H. Kettering
Vice President

/s/ [Illegible]
Asst. Secretary

FIRST AMENDMENT TO THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN (January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective as of January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan; and

WHEREAS, it is desirable to amend the Plan;

NOW, THEREFORE, effective as of January 1, 1976, but with respect only to those employees who retire, die or otherwise terminate their employment on or after January 1, 1976, the Plan hereby is amended in the respects herein provided.

1. Section 23 of Article I of the Plan hereby is amended to provide as follows:

> *Section 23. Hour of Service.* An "hour of service" with respect to any Employee means an hour of service which shall be credited to him for purposes of the Plan for:
>
> (a) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Company for the performance of duties as an Employee; provided, however, that hours paid at a premium rate shall be treated as straight-time hours. These hours shall be credited to the Employee for the computation period or periods in which the duties are performed; and
>
> (b) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Com-

pany on account of a period of time during which no duties as an Employee are performed (irrespective of whether he remains an Employee) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence, up to a maximum of eight hours per day and 40 hours per week; provided, however, that no more than 501 hours of service shall be credited to an Employee on account of any single continuous period during which he performs no duties (whether or not such period occurs in a single Plan Year); provided, further, that no hours of service shall be credited for payment which is made or due under a program maintained solely for the purpose of complying with applicable Workmen's Compensation, unemployment compensation, or disability insurance laws; and provided, further, that no hours of service shall be credited to an Employee for payment which is made or due solely as reimbursement for medical or medically related expenses incurred by him. These hours shall be credited to the Employee for the computation period or periods in which the period during which no duties are performed occurs, or if the period during which no duties are performed extends beyond one computation period, such hours shall be allocated between not more than the first two computation periods on any reasonable basis which is consistently applied with respect to all employees within the same reasonably defined job classification.

(c) each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by his Employing Company; provided, however, that the crediting of hours of service for back pay awarded or agreed to with respect to periods of employment or absence from employment described in any other subparagraph of this Section 23 shall be subject to the limitations set forth therein. These hours shall be credited to the Employee for the com-

putation period or periods to which the award or agreement pertains rather than to the computation period in which the award, agreement, or payment was made; and

(d) each hour for which he would have been scheduled to work for his Employing Company during the period of time that he is on Approved Absence, up to a maximum of eight hours per day and 40 hours per week; provided, however, that hours of service credited under this paragraph (d) when added to hours of service credited under paragraph (b) or (c), if any, by reason of such absence, shall not exceed a total of 1,000 hours of service for any one computation period. Notwithstanding anything to the contrary contained in this Section 23, no more than one hour of service shall be credited to an Employee for any one hour of his employment or absence from employment. The rules set forth in paragraphs (b) and (c) of Department of Labor Regulation 2530.200b-2, related to special rules for determining hours of service for reasons other than the performance of duties and the crediting of hours of service to computation periods, to the extent not provided hereunder, hereby are incorporated by reference, pursuant to Department of Labor Regulation § 2530.200b-2(f).

2. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Normal Rctirement. Each Participant who retires hereunder on or after his Normal Retirement Date shall be eligible for a normal retirement benefit in an amount computed in accordance with the provisions of Article V; provided, however, that the interest of each such Participant shall become fully vested and nonforfeitable upon attainment of age 65. Prior to January 1, 1979, no Participant may continue in employment with an Employing

Company after his Normal Retirement Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68; provided, however, that prior to the earlier of (i) the expiration date of any applicable collective bargaining agreement in effect for a Participant on September 1, 1977, or (ii) January 1, 1980, no Participant who is covered by such a bargaining agreement may continue in employment with an Employing Company after his Normal Retirement Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68. Except as otherwise provided by applicable State law, in no event may an Employee continue in employment with the Corporation, an Employing Company or any Related Employer beyond age 70.

3. Section 1(d) of Article V of the Plan hereby is amended to provide as follows:

(d) The Primary Social Security Benefit applicable to a Participant under (a) shall be determined by multiplying (i) a factor equal to 1.43% times his years of Credited Past Service with proportionate allowance for completed months, up to a maximum of 35 years, by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at his Normal Retirement Date or earlier date of termination of employment.

4. Section 4 of Article V of the Plan hereby is amended to provide as follows:

Section 4. Maximum Retirement Benefit. The maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other qualified employee pension benefit plan maintained by an employer (as defined in Article XVI) at any time within a limitation year may not exceed the lesser of (i) 60% of his Final Average

Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article V, or (ii) the limitation provided in Article XVI.

5. Section 2 of Article IX of the Plan hereby is amended to provide as follows:

Section 2. Automatic Election For Married Participant. A Participant

(a) who is eligible to receive a normal, early, disability, or vested deferred retirement benefit under Article IV, VI, or VIII; who has attained age 55; and who is married on the date payment of such benefit commences; or

(b) who dies (i) after retirement under conditions of eligibility for a normal or early retirement benefit under Article IV but prior to the commencement of benefit payments, or (ii) after his 65th birthday but before his retirement or other termination of employment; and who is married on the date of his death;

shall be deemed to have elected the qualified joint and survivor annuity, described as the option provided in Section 3(a) except that the effective rate shall be only a rate of one-half, and to have designated his spouse on such date as his beneficiary thereunder, unless prior to such date he either (i) has elected an optional method of payment under Section 3 of this Article IX which became or would have become effective upon commencement of benefit payments, or (ii) filed with the Administrative Committee a written rejection of this automatic election which has not been withdrawn; provided, however, that no monthly benefit shall become payable hereunder to a spouse as beneficiary if such spouse is not

the same spouse to whom the former Participant was married on the date his benefit payment commenced, with respect to an automatic election under paragraph (a) of this Section 2.

6. The Plan hereby is amended by adding Section 3(h) to Article IX to provide as follows:

(h) Notwithstanding the foregoing provisions of this Section 3, if a Participant designates a person other than his spouse as his beneficiary, the present value of the total payments to be made to the beneficiary at the time the option becomes effective shall be less than 50% of the present value of the total payments to be made to the former Participant and his beneficiary combined, and if such is not the case, the monthly amount payable to his beneficiary shall be reduced to the extent necessary to satisfy such requirement. A reduction made pursuant to this paragraph (h) shall be that which is necessary to determine the Actuarial Equivalent.

7. Section 4(e) of Article IX of the Plan hereby is amended to provide as follows:

(e) (1) Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 85 days prior to commencement of his benefit payments. At least 18

months before the date a Participant or former Participant attains age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e) (ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

8. The Plan hereby is amended by amending Section 5 of Article IX and by adding to Article IX, Sections 6, 7, 8, 9 and 10, to provide as follows:

Section 5. Special Joint and Survivor Annuity. Each Participant who has attained age 54, but who has not attained age 65, and who has ten or more years of Qualifying Service may elect, after his Coverage Effective Date (defined in Section 9), to receive a reduced monthly retirement benefit and preretirement survivor benefit (special joint and survivor annuity) coverage for his spouse under Sections 5 through 10 of this Article IX, in lieu of any retirement benefit otherwise payable under the Plan.

Section 6. Election Period. A Participant's election under Section 5 shall be filed with the Administrative Committee, on such form as it shall require, not earlier than 90 days before such Participant becomes eligible to make an election as provided in Section 5 and not later than the earlier of (i) such Participant's retirement or other termination of employment with the Corporation, an Employing Company, or a Related Employer, or (ii) his 65th birthday. At least six months prior to the date on which a Par-

ticipant becomes eligible to make an election as provided in Section 5, the Administrative Committee shall furnish such Participant with a written description of the pre-retirement survivor benefit and the availability of a statement of the terms and conditions of the pre-retirement survivor benefit and its financial effect on his monthly retirement benefit.

Section 7. Survivor Benefit. If a Participant who has made an election under Section 5 of this Article IX shall die after his Coverage Effective Date and before his election terminates under Section 10, a monthly payment will be made to the surviving spouse of the Participant, provided that the Participant had not retired or otherwise terminated employment with the Corporation, an Employing Company, or a Related Employer prior to his death. The amount and duration of such monthly payment to the Participant's surviving spouse shall be determined and paid as if the Participant had retired on the date immediately preceding the date of his death and had elected to receive a monthly retirement benefit under the automatic election of Section 2, based upon his Credited Service and the benefit rate in effect on the date of his death; provided, however, that the amount of the benefit so determined shall be reduced, as well, by the appropriate factor provided in Section 8 to reflect the cost of pre-retirement survivor benefit coverage under Section 5.

Section 8. Reduction of Other Benefits. The amount of any monthly retirement benefit otherwise payable under the Plan after a Participant's election terminates under Section 10 shall be reduced, in accordance with the following table, for each full year (with pro rata reduction for completed months) between the Coverage Effective Date and the date his pre-retirement survivor benefit coverage terminates. If a Participant files more than one election under

Section 5, such reduction shall be applied for the entire period during which any pre-retirement survivor benefit coverage was in effect.

Proportion of Reduced Retirement Benefit to Be Paid To Beneficiary Under Option Elected	Percentage Reduction of Retirement Benefit of Participant for Each Full Year of Coverage (With Pro Rata Reduction For Completed Months)
½	½ of 1%
⅔	⅔ of 1%
¾	¾ of 1%

Section 9. Coverage Effective Date. A Participant's "Coverage Effective Date" shall be the first date, after his election under Section 5 has been filed with the Administrative Committee, as provided in Section 6, on which the Participant has attained age 55 and has completed ten years of Qualifying Service, or, if later, the date specified in such election as the Coverage Effective Date; provided, however, that a Participant's Coverage Effective Date shall not occur before the end of the 12-month period beginning on the date his election is filed with the Administrative Committee, unless the death of the Participant is a result of accidental causes and failure to give effect to the election would deprive the survivor of the Participant of a survivor annuity.

Section 10. Termination and Revocation of Election. A Participant's election under Section 5 shall terminate automatically on the date his spouse dies, he is divorced, he retires or otherwise terminates employment, or he attains age 65, whichever is earliest. Moreover, a Participant at any time before such date, may file with the Administrative Committee a written revocation of a previous election under Section 5, and such election shall terminate on the date the revocation is filed. A Participant subsequently may file an election under Section 5 and

such election shall be treated as a new election for all purposes of Sections 5 through 10.

9. Section 7 of Article X of the Plan hereby is amended to provide as follows:

Section 7. Missing Persons. If the Administrative Committee is unable to ascertain the identity or location of a former Participant or beneficiary to whom a benefit is due and payable hereunder, the Administrative Committee may direct that such benefit shall be forfeited. Such benefit shall in no event be less than that which is fully vested hereunder, if any. However, if a claim is made for such forfeited benefit by such Participant or beneficiary, the Administrative Committee shall reinstate such forfeited benefit and shall make payment as otherwise provided under the Plan.

10. The Plan hereby is amended by adding thereto Article XVI to provide as follows:

ARTICLE XVI

MAXIMUM RETIREMENT BENEFITS

Section 1. Definitions. For purposes of this Article XVI, the following definitions shall apply in addition to those set forth in Article I:

(a) The term "employer" shall mean the Corporation and any other corporation which is a member of a controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code of 1954, as amended (the "Code"), determined without regard to Section 1563(a)(4) and Section 1563(e)(3)(C) of the Code, as modified by Section 415(h) of the Code) of which the Corporation also is a member.

(b) A "limitation year" shall mean a calendar year or such other 12-month period elected by the

employer pursuant to Internal Revenue Service Regulations and rulings under Section 415 of the Code, or applicable portion thereof, commencing on or after January 1, 1976, and each such calendar year or other such 12-month period thereafter.

(c) A Participant's "projected annual retirement benefit" shall mean the annual retirement benefit which would be payable to the Participant under the Plan based on the assumption that he continues his employment as an Employee until his Normal Retirement Date and that his compensation for the limitation year continues at the same rate until his Normal Retirement Date, and on the basis of the federal Social Security Act as in effect on the last day of the limitation year. A Participant's "aggregate projected annual retirement benefit" shall include his projected annual retirement benefit under the Plan and his projected retirement benefit, if any, under any other defined benefit plan maintained by the employer.

(d) The limitations contained in this Article XVI shall be applicable only with respect to benefits provided pursuant to defined contribution plans and defined benefit plans specified in Section 415(k) of the Code.

Section 2. Maximum Defined Benefit Limitation. Subject to the provisions of Section 3, the maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other defined benefit plan maintained by an employer at any time within a limitation year may not exceed the lesser of:

(a) $80,475 (subject to adjustment annually pursuant to Internal Revenue Service Regulations under Section 415 of the Code), or

(b) 100% of the Participant's average annual compensation for his highest three consecutive years of service,

multipled by the following:

(c) the appropriate factor prescribed by the Internal Revenue Service, if the Participant's retirement benefit is to be paid in a manner other than to the Participant for life only or under Section 2 of Article IX, with the Participant's spouse as beneficiary thereunder; and

(d) the percentage determined by dividing the number of his years of Qualifying Service by 10, if the Participant has less than ten years of Qualifying Service; and

(e) a factor which converts such benefit to its actuarial equivalent commencing at age 55, if payment of the Participant's retirement benefit is to commerce prior to age 55 and the maximum described in subparagraph (a) of this Section 2 is applicable.

Section 3. Exception. If the Participant's projected annual retirement benefit does not exceed $10,000, as adjusted by the percentage shown in subparagraph (d) of Section 2 of Article XVI, if applicable, he may receive the full amount of such benefit without regard to the other limitations specified in Section 2, provided the Participant did not participate at any time in any defined contribution plan maintained by an employer.

Section 4. Manner of Reduction. If the Participant's aggregate projected annual retirement benefit exceeds limitations specified in Section 2, the reduction in the amount of his projected annual retirement benefit under the Plan shall be equal to the amount by which his aggregate projected annual retirement benefit exceeds the limitations of Section 2, multiplied by a fraction, the

numerator of which is his projected annual retirement benefit under the Plan (determined without regard to Section 2), and the denominator of which is his aggregate projected annual retirement benefit under the Plan and any other defined benefit plan maintained by an employer (determined without regard to the limitations of Section 2, or any corresponding limitation in any other defined benefit plan maintained by an employer).

Section 5. Maximum Defined Benefit and Defined Contribution Limitation. If a Participant also is covered by one or more defined contribution plans maintained by an employer concurrently with the Plan, the sum of the defined benefit plan fraction described in subparagraph (a) and the defined contribution plan fraction described in subparagraph (b) of this Section 5 in no event shall exceed 1.4 in any limitation year.

(a) The defined benefit plan fraction (determined as of the close of such limitation year) shall be a fraction the numerator of which is the aggregate projected annual retirement benefit of such Participant and the denominator of which is the maximum retirement benefit allowable under Section 2; and

(b) The defined contribution plan fraction shall be a fraction the numerator of which is equal to the sum of:

(i) total employer contributions allocated to the Participant's account or accounts maintained under all such plans during each limitation year;

(ii) total forfeitures, if any, allocated to the Participant's account or accounts maintained under all such plans during each limitation year; and

(iii) the lesser of:

(1/) one-half of the Participant's own contributions to all such plans (plus his

own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year; or

(2/) the Participant's own contributions to all such plans (plus his own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year, in excess of 6% of his compensation for the Plan Year;

and the denominator of which is the sum, for all limitation years, of the amounts determined for each such limitation year, as follows:

(iv) the lesser of:

(1/) $26,825 (subject to adjustment annually pursuant to Internal Revenue Service Regulations, and rulings under Section 415 of the Code), or

(2/) 25 percent of the Participant's compensation paid by an employer for such limitation year.

In the event that the sum of the defined benefit plan fraction and the defined contribution plan fraction would exceed the limitation of 1.4, the benefits otherwise payable to a Participant under the Plan shall be reduced to the extent necessary to meet such limitation.

* * * *

EXECUTED this 14th day of September, 1979.

Attest:

/s/ G. J. Maly Jr.
Title: Secretary

THE MEAD CORPORATION

By: /s/ G. H. Sheets
Title: Executive Vice President

AMENDMENT NO. 2
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

The Plan is hereby amended in the following respects, effective May 1, 1978.

1. The first sentence of Section 3 of Article IX is hereby amended to read as follows:

> In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive a benefit which is the Actuarial Equivalent thereof, in any one of the following forms:

2. Subsection (e) of Section 3 of Article IX is hereby amended to read as follows:

> (e) An annuity in some other form, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

3. A new subsection (i) of Section 3 of Article IX is hereby added to read as follows:

> (i) A lump sum distribution. In determining the value of such a distribution, the Administrative Committee shall employ the then current interest assumption used by the Actuary to perform its annual examination pursuant to Section 2 of Article XII.

4. Subsection (a) of Section 4 of Article IX is hereby amended to read as follows:

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e), 3(i) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant.

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e), 3(i) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant.

(iii) Notwithstanding paragraphs (i) and (ii) above, a Participant may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement.

5. Subsection (e) of Section 4 of Article IX of the Plan hereby is amended to provide as follows:

(e) (i) A Participant may revoke his election of an optional form of retirement income within the time limits and under the circumstances set forth in Subsection (a) above. Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 30 days prior to commencement of his benefit payments. At least 18 months before the date a Participant or former Participant attains age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e)(ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

6. New Subsection (h) of Section 4 of Article IX is hereby added to read as follows:

(h) Regardless of when the election of an optional form of retirement income is made or becomes effective, the actuarial assumptions, tables and factors used to determine the appropriate Actuarial Equivalent shall be those in effect without regard to retroactive changes on the later of (i) the last date specified in paragraphs (i) or (ii) of Subsection (a) above upon which the optional form could have been elected, or (ii) the date upon which the optional form is elected pursuant to paragraph (iii) of Subsection (a).

7. In all other respects, the Plan shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 2nd day of January, 1979.

THE MEAD CORPORATION

By: /s/ [Illegible]
Vice President

ATTEST:

By: /s/ G. J. Maly Jr.
Assistant Secretary

THIRD AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on two subsequent occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1979, but with respect only to employees who retire, die, or otherwise terminate their employment on or after January 1, 1979, the Plan hereby is amended in the respects herein provided.

1. Section 8 of Article I of the Plan hereby is amended to provide as follows:

> *Section 8. Employee.* A regular, full-time person who is employed by an Employing Company, as determined by the Employing Company under its normal practices, and who is (i) a citizen of the United States, (ii) an alien permanently assigned to an Employing Company, as determined by the Administrative Committee, or (iii) an alien on permanent or temporary assignment who was covered by the Plan prior to January 1, 1979. The term "Employee" shall not include any person
>
> > (a) who is accruing benefits under any other employee pension benefit plan, other than the Mead Employee Stock Ownership Plan, which is qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended (the

Code"), and to which the Corporation or any other controlled corporation (as that term is defined in Section 1563(a) of the Code, determined without regard to Sections 1563(a)(4) and 1563(e)(3)(C) of the Code) makes contributions; or

(b) who is participating in any employee pension benefit plan maintained in a foreign country primarily for foreign nationals.

Further, a former Employee of an Employing Company who is transferred to work as an employee for a Related Employer which is not such a controlled corporation shall continue to be an Employee unless such transferred employee (i) waives his right to accrue benefits under the Plan, (ii) is accruing benefits under a plan described in (a), or (iii) is participating under a plan described in (b). The term "Employee" includes a person described in (b). The term "Employee" includes a person who is on Approved Absence, if immediately prior to such Approved Absence, such person was an Employee.

2. Section 12(b) of Article I of the Plan hereby is amended to provide as follows:

(b) *For Minimum Retirement Income.* For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with the Corporation, an Employing Company or a Related Employer before his Early Retirement Date, Normal Retirement Date, or the date on which he terminates his employment with a vested interest, whichever comes first.

3. Section 12(c) of Article I of the Plan hereby is amended to provide as follows:

(c) *Determination.* In the event that an Employee has less than five (5) years of such con-

tinuous employment, the Final Average Earnings shall be the average of all complete calendar years prior to his Normal Retirement Date.

For purposes of paragraph (a), in the event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

4. Section 6 of Article III of the Plan hereby is amended to provide as follows:

Section 6. Reemployment. Upon the remployment by the Corporation, an Employing Company or a related Employer of a Participant who was terminated without any vested benefit, the Participant shall receive Credited Service.

(a) for his continuous employment as a Participant earned prior to his attaining age 65 and prior to his termination of employment, if the period of his break in employment is less than his period of employment which occurred prior to the break, or

(b) for the period of the break in employment which occurred prior to his attaining age 65, if the Participant is reemployed within the 12-month period which follows his date of termination of employment.

Upon the reemployment by the Corporation, an Employing Company or a Related Employer of a Participant who had terminated with a vested benefit, he shall receive Credited Service for his service with the Corporation or an Employing Company as a Participant which occurs prior to his attaining age 65 and for which he had Earnings.

5. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Eligibility For Normal Retirement. Each Participant who retires on or after the date

he attains age 65 from employment with the Corporation, an Employing Company and a Related Employer (i) shall be eligible for a monthly normal retirement benefit in an amount computed in accordance with the provisions of Article V, and (ii), as of the date on which he attains age 65, shall have a fully vested and nonforfeitable interest in his monthly normal retirement benefit. A Participant's Normal Retirement Date means the first day of the month coincident with, or next following the date on which he attains age 65. On or after January 1, 1979, no Employee may continue in the employ of the Corporation, an Employing Company or a Related Employer after he has attained age 70 unless otherwise provided by State law.

6. The first sentence of Section 1 of Article V of the Plan hereby is amended to provide as follows:

Section 1. Amount of Retirement Income.

A Participant who retires on or after his Normal Retirement Date shall be enitled to a monthly normal retirement benefit equal to the greater of the amounts specified in paragraph (a) or (b) for all years prior to January 1, 1976 and prior to age 65, plus the amount specified in paragraph (c) for all years after December 31, 1975 and prior to age 65, as follows:

7. Section 4(a) of Article IX of the Plan hereby is amended to provide as follows:

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a) (i) To become effective, a Participant's election of an optional form of payment of his retirement income (other than the optional forms of payment provided under the terms of Sections 3(e), 3(i) and 5 of this Article IX) must be

made either within 30 days following the Effective Date of the Plan or at least 30 days before his normal Retirement Date or earlier actual retirement.

(ii) To become effective, a Participant's election of an optional form of payment of his retirement income, as described in Sections 3(e), 3(i) and 5 of this Article IX, must be made either within one year following the Effective Date of the Plan or at least one year before his Normal Retirement Date or earlier actual retirement.

(iii) Notwithstanding the provisions of (i) and (ii), a Participant may elect an optional form of payment of his retirement income or change his beneficiary at any time prior to the earlier of his attaining age 65 or his retirement date, if he furnishes evidence in good health satisfactory to the Administrative Committee; and provided, further, that a Participant who is retired involuntarily prior to his Normal Retirement Date, may exercise his election of an optional form of payment of his retirement income at any time prior to his actual retirement.

8. Section 3(c) of Article X of the Plan hereby is amended to provide as follows:

(c) In any case where the payment of a retirement benefit provided by the terms of the Plan to a Participant ceases due to his reemployment by the Corporation, an Employing Company or a Related Employer, the amount of his retirement benefit which will be paid on his subsequent retirement shall be determined actuarially on the basis of, as applicable, his increased service (if any) prior to the date on which he attains age 65, age, contributions (if any), amount of retirement benefit which was paid to him prior to his reemployment, and any other factors which are relevant to such a determination.

* * * *

EXECUTED at Dayton, Ohio, this 28th day of December, 1979.

THE MEAD CORPORATION

By /s/ C.H. Gebhardt, V.P.
Title:

Attest:

/s/ [Illegible]
Title:

FOURTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on three prior occasions; and

WHEREAS, it is desirable to further amend the Plan in accordance with action taken by the Board of Directors in January, 1981;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, the definition of Earnings contained in Article I, Section 11(a) of the Plan is amended to provide as follows:

Section 11. Earnings.

(a) *For Years After December 31, 1975*:

Amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer, and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Amounts paid other than in cash;

(ii) Gifts;

(iii) Amounts paid pursuant to a long-term incentive plan;

(iv) Amounts deferred by an Employee pursuant to a plan or agreement of deferred compensation;

(v) Amounts paid pursuant to a special arrangement, agreement or contract between the Employing Company or Related Employer and an individual Employee, except as provided by the Corporate Benefits Committee;

(vi) Twenty percent of all commissions paid to an Employee whose compensation is wholly or partially determined on the basis of gross commissions; provided, however, that this exclusion shall not apply to an Employee whose sales-related expenses are reimbursed by the Employing Company or Related Employer; and

(vii) Amounts received by an Employee as reimbursement for relocation costs.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 30th day of January, 1981.

THE MEAD CORPORATION

By /s/ Lee Bauman
Vice President

Attest:

By /s/ [Illegible]

FIFTH AMENDMENT TO THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN (January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on four prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, Section 4 of Article III of the Plan is amended and a new Section 8 is added to Article V as follows:

Section 4. Approved Absence. For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year after the applicable Effective Date during the entirety of which an Employee is on such Approved Absence and as to which no Earnings are payable to the Employee shall not be credited for the purposes of this Plan.

* * * *

Section 8. Offsets for Other Retirement Benefits. A Participant's retirement income calculated under Sections 1 and 3 of this Article V shall be reduced by any retirement income, expressed as an annual income payable for life, which he is eligible to receive from a tax-qualified retirement plan of the Employing Company or a Related

Company and which is attributable to Credited Service used in computing his retirement income under the Plan.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 23rd day of October, 1981.

THE MEAD CORPORATION

By /s/ R. W. Baumann

Attest:

By /s/ [Illegible]

SIXTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on five prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1982, but with respect only to Employees who retire, die or otherwise terminate their employment on or after April 1, 1982, a new subsection (c) of Section 2 is added to Article V of the Plan, and a new subsection (i) of Section 4 is added to Article IX as follows:

> (c) A Participant who elects an Early Retirement Date in accordance with the conditions of this Subsection shall be entitled to a retirement income supplement for life, payable monthly in conjunction with his retirement income, in an annual amount which is equal to (i) the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date, minus (ii) the amount of retirement income to which he is entitled under Subsection (a) above. An electing Participant must have attained age fifty-five (55) and accrued at least ten (10) years of service as of January 1, 1982. At that date, he must be either (i) actively employed on a regular payroll or (ii) receiving short-term disability pay-

ments in the nature of salary continuation. He must elect the retirement supplement between January 1 and February 28, 1982, and retire on April 1, 1982; provided, however, that each Employing Company's retirement to a date not later than April 1, 1983. Participants otherwise eligible for the retirement supplement who do not make a timely election in accordance with the foregoing sentence shall not be entitled to the supplement at any time.

* * * *

(i) Notwithstanding Subsections (d) and (e) above, a Participant who had attained his Normal Retirement Date prior to April 1, 1982, and who had not then retired, may revoke his election of an optional form of retirement income and substitute another option therefor; provided he actually retires on April 1, 1982, or such later date on or before April 1, 1983, to which his Employing Company defers his retirement.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 28th day of June, 1982.

THE MEAD CORPORATION

By /s/ R. W. Baumann
Vice President

Attest:

By /s/ [Illegible]
Assistant Secretary

[LETTERHEAD OF
PENSION BENEFIT GUARANTY CORPORATION]

(November 29, 1983)

In reply refer to: 110-50962
Name of Plan: Mead Industrial Products Salaried Retirement Plan

R. E. Emrick
Mead Corporation
World Headquarters
Courthouse Plaza Northeast
Dayton, Ohio 45463

Dear Mr. Emrick:

The Pension Benefit Guaranty Corporation (PBGC) received the information required to demonstrate sufficiency relating to the termination of the above-identified Plan. Based on this, the Corporation is issuing the enclosed Notice of Sufficiency in accordance with Section 4041(b) of the Employee Retirement Income Security Act of 1974 (ERISA).

Upon receipt of the Notice of Sufficiency, you have 90 days to complete the termination of the Plan in accordance with Subtitle C, Title IV of ERISA.

Please note that in order to remove your plan from the PBGC-1 Form and premium billing mailing list, Subpart C of 29 CFR Part 2615, requires you to submit to PBGC within 60 days after the completion of the distribution of plan assets, a certified statement that the plan assets were allocated in accordance with Section 4044 of ERISA, and also include the following information:

(1) For each participant or beneficiary to whom distribution was made—

(a) Name,

(b) Address,

(c) Telephone number,

(d) Sex,

(e) Date of birth,

(f) Social security number,

(g) The amount of benefit provided and unless previously submitted, the basis for computing the amount,

(h) The cost of providing the benefit, and

(i) The form in which the benefit was provided.

(2) If annuity contracts were purchased from an insurer, the name of the insurer and the policy number(s); and

(3) The place or places where plan records will be held.

Please note the enclosed booklet regarding establishment of IRAs.

Sincerely,

/s/ Lance L. Len
Case Officer, CPD 2/3
Division of Case Processing
(202) 254-7873

Enclosure

[LETTERHEAD OF
PENSION BENEFIT GUARANTY
CORPORATION]

Date: November 29, 1983

NOTICE OF SUFFICIENCY

Name of Plan: Mead Industrial Products Salaried Retirement Plan

Date of Termination: August 1, 1983

Proposed Date of Distribution: December 31, 1983

Based on the information you supplied us, we hereby find that the assets of this Plan will be sufficient as of your proposed date of distribution to discharge when due all obligations of the Plan with respect to guaranteed benefits.

This finding is made under the Employee Retirement Income Security Act of 1974, Section 4041(b), 29 U.S.C. 1341(b).

/s/ Lance L. Len
Case Officer
Case Processing Division, 2/3
(202) 254-7873

INTERNAL REVENUE SERVICE
District Director

Department of the Treasury
P.O. Box 2508, Cincinnati, OH 45201

Person to Contact: Jim Sandy
Telephone Number: 513-684-3947
Refer Reply to: EP/EO
Date: April 29, 1986

File Folder Number: 310002047
Re: The Mead Industrial Products Salaried Retirement Plan

(Received March 31, 1988)

The Mead Corporation
Mead World Headquarters
Courthouse Plaza N.E.
Dayton, Ohio 45463

Dear Sir or Madam:

We have considered the information you sent us and have determined that your termination of this plan does not adversely affect its qualification for Federal tax purposes. Please note that this is not a determination regarding the effect of other Federal or local statutes.

Even though you have terminated this plan, we would like to remind you of certain filing obligations. The related tax-exempt trust, custodial account, or other payers who are responsible for making payments may be required to file information returns on Forms W-2P or 1099R, with Forms W-3 or 1096, respectively, for

amounts paid or made available to any individual or beneficiary.

In addition, you must continue to file a Form 5500 series return annually until all plan assets are distributed. The last return required is the one filed for the year in which distribution is completed. Be sure to write "Final Return" across the top of this return.

Your plan's qualified status will be adversely affected if plan assets are returned to you before the plan's liabilities to all plan participants are satisfied by the purchase of guaranteed annuity contracts or the making of lump sum distributions. When you receive these excess plan assets, you should notify the Service of the date(s) you receive such assets and the date(s) guaranteed annuity contracts were purchased, or the date(s) of the payment of lump sum distributions for all participants.

Proposed date of termination is August 1, 1983.

This determination includes consideration of the response to our request for technical advice. Attached is a copy of this response.

This determination letter does not apply to any provisions of the Tax Equity and Fiscal Responsibility Act of 1982.

You should keep this letter in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ James J. Ryan
District Director

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3463, 90-3540

DAVID A. NOBERS, INDIVIDUALLY
and on BEHALF OF HIMSELF and
ALL OTHERS SIMILARLY SITUATED,
Appellant in No. 90-3463

vs.

CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN,
Appellant in No. 90-3540

On Appeal From the United States District Court
For the Western District of Pennsylvania

(D.C. Civil No. 88-1237)

District Judge: Honorable Glenn E. Mancer

Submitted Pursuant to Third Circuit Rule 12(6)
January 10, 1991

BEFORE: STAPLETON, GREENBERG, and SEITZ,
Circuit Judges

(Opinion filed Jan. 29, 1991)

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Former employees of Crucible, Inc. ("the employees") here appeal from an order of the district court dismissing their claim of entitlement to unreduced early retirement subsidies pursuant to the Crucible, Inc., 1975 Salaried Retirement Plan ("the Plan"). The employees claim that ERISA mandates the payment of such subsidies before any residual assets can revert to the employer, Crucible. The Plan cross-appeals from the portion of the district court's order denying the Plan's request for attorney's fees. We have jurisdiction under 28 U.S.C. § 1291. We will affirm both aspects of the district court's order.

We engage in plenary review of the decision of the district court granting summary judgment in favor of the Plan. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We review the court's decision concerning attorney's fees for an abuse of discretion. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983).

The case bears a striking resemblance to *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 3155 (1989). The facts are the same and will not be recounted here.

Normal pension benefits accrue over the course of employment and vest periodically. The Plan employs a normal retirement age of 65. When an employee reaches the age of 65, the employee can retire and his or her full pension will be based on the benefits that have accrued over his or her years of service. The Plan decreases the benefits of those employees who retire prior to the age of 65. Thus, the employee's pension is normally "actuarily" reduced by a given percentage for each month he or she is shy of his or her 65th birthday. The employees here claim entitlement to early retirement subsidies. These subsidies supplement the actuarily reduced pension benefits of certain employees who retire before the age of 65.

The early retirement provision of the Plan grants a subsidy to employees who retire "early" (i.e., prior to the normal retirement age of 65) if they have thiry years of service and are at least 62 years old. Qualifying early retirees receive monthly pension checks equal in amount to those of their 65 year old co-workers with identical service records. An alternative provision of the plan provides more limited subsidies to employees with 30 years of service who are not yet 62. If an employee never attains thirty years of service, or chooses not to retire until the age of 65, he or she does not receive early retirement subsidies under the Plan.

The employees argue that the early retirement subsidies constitute "liabilities of the plan" within the meaning of § 4044(d)(1)(A) of ERISA.[1] Section 4044 (d)(1)(A) provides as follows: "*Distribution of residual assets; remaining assets.* Any residual assets of a single employer plan may be distributed to the employer if . . . [a]ll liabilities of the plan to participants and their beneficiaries have been satisfied." The employees accordingly conclude that provision must be made for the early retirement subsidies before any Plan assets may revert to Crucible. We cannot accept this conclusion.

The Pension Benefit Guaranty Corporation ("PBGC") is the government corporation created to administer and enforce Title IV of ERISA. Title IV concerns the termination of plans. Accordingly, the PBGC's views on questions like the one before the court are entitled to deference. In *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S. Ct. 2156 (1989), the Supreme Court remanded to the Court of Appeals for the Fourth Circuit with instructions to hear argument concerning the same "liabilities of the Plan" theory the employees are advancing here. The Court counseled, "[i]n deciding these issues, the Court

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[1] The Supreme Court left this question open in *Mead Corp. v. Tilley*, 490 U.S. 714, 109 S. Ct. 2156 (1989).

of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to 'embar[k] upon a voyage without a compass.' " 109 S. Ct. at 2164.

In the present case, the district court observed that, "[t]he Supreme Court has stated that '[a] reviewing court is also to be guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." ' " Dist. Ct. Op. at 6 (*quoting E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977)). With this principle in mind, we set forth the views espoused in the PBGC's amicus brief.

Since its inception, the PBGC has taken the position that the "liabilities of the plan" that must be satisfied under § 4404(d) are coextensive with the benefits included in the priorities of § 4404(a). "Thus, if a benefit is not required to be assigned to an asset allocation category under section 4044(a)(1)-(6), there can be no liability for that benefit under section 4044(d)(1)(A)." PBGC Amicus Brief at 5.[2] We conclude that this reading of § 4044(d)(1)(A) is both reasonable and supported by the legislative history. Accordingly, we accept it.

Section 4044(a)(1)-(6), entitled "Order of priority of participants and beneficiaries," provides as follows:

> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits)

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[2] In addition to its brief, the PBGC's regulations state that "[i]f a plan has assets remaining after satisfaction of all benefits in priority categories 1 through 6 [of § 4044(a)], those residual assets shall be allocated in accordance with section 4044(d) of the Act." 29 C.F.R. § 2618.10(d). Thus, if the claimed benefit is not one that must be assigned to one of the categories under § 4044(a), it is not a liability of the fund under § 4044(d).

among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, . . . benefits payable as an annuity . . . .

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter . . . .

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

Section 4044(a), 29 U.S.C. § 1344(a).

Subsections (1) through (5) of § 4044(a) list in order of priority five different kinds of nonforfeitable benefits. We held in *Ashenbaugh* that an employee's expectancy of an early retirement subsidy prior to his or her having rendered the required years of service was not a nonforfeitable benefit. Taking issue with the Second Circuit's decision in *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), we further concluded in *Ashenbaugh* that such an expectancy of an early retirement subsidy was not the kind of forfeitable benefit which comes within the scope of subsection (6) of § 4044(a). 854 F.2d at 1528-29.

Adopting the PBGC's reading of § 4044(d)(1)(A) as we do and accepting the conclusions reached in *Ashenbaugh* as we must, we are constrained to hold that the

employee's expectations of early retirement subsidies are not "liabilities" within the meaning of § 4044(d)(1)(A). The employees urge that we reconsider *Ashenbaugh.* Given that the PBGC endorses the conclusions that we there reached, we would be reluctant to abandon those conclusions even if we were free to do so. But, in any event, we are not. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 9.1.

Finally, we turn to the subject of attorney's fees. Section 502(g) of ERISA, 29 U.S.C. 1132(g), provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Plan appeals from the district court's order denying the Plan's request for attorney's fees. Reviewing the court's decision for abuse of discretion, we find no abuse. While the issues presented here and in *Ashenbaugh* are closely related, this proceeding was a good faith effort to pursue a theory arguably supported by the Supreme Court's actions in *Mead Corp. v. Tilley,* 490 U.S. 714, 109 S. Ct. 2156 (1989).

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Walter K. Stapleton
Circuit Judge

[SEAL]

U.S. Department of Justice
Tax Division

SDP:ORA:MJRoach:yc
5-24-O

Washington, D.C. 20216
December 27, 1989

John M. Graecen, Esquire
Clerk, U.S. Court of Appeals
for the Fourth Circuit
Room 402, U.S. Courthouse
10th & Main Streets
Richmond, Virginia 23219

Re: B. E. Tilley, et al, v. Mead Corporation
(4th Cir.—No. 86-3858)

Dear Mr. Graecen:

In its opinion of June 5, 1989, reversing this Court's original decision in this ERISA case, and remanding the matter for further proceedings, the Supreme Court noted that, on remand, this Court should consider the views of the Internal Revenue Service as well as those of the Pension Benefit Guaranty Corporation. (Slip op. at 11.) The purpose of this letter is to advise the Court of the view of the Internal Revenue Service.

The issue on remand in this case is whether, prior to the enactment of the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, early retirement benefits such as those provided in the Mead-sponsored pension plan, constituted "liabilities" of the plan before any excess assets could revert to the plan's sponsor. See Section 401(a)(2) of the Internal Revenue Code (26 U.S.C.). It is the position of the Internal Revenue Serv-

ice that such pre-REA early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code, notwithstanding the fact that such benefits constituted "accrued benefits" for plan amendment purposes under Section 411(d)(6) of the Code. See *Amato v. Western Union, Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985). That position is set forth in detail in a letter of January 16, 1986, from the Acting Assistant Commissioner (Employee Plans and Exempt Organizations) and the Chief Counsel of the Internal Revenue Service to the General Counsel of the PBGC, which Mead has obtained and reproduced in an appendix to its brief to this Court. We have been authorized by the Internal Revenue Service to advise the Court that the views expressed in that letter continue accurately to reflect that agency's position on this issue and to further inform the Court that the Internal Revenue Service's consistent administrative practice in reviewing pre-REA plan terminations was to treat early retirement benefits as outside the scope of Section 401(a)(2).

Because the copy of the forementioned letter of January 16, 1986, as reproduced in the appendix to Mead's brief contains certain printing errors, we are enclosing four copies of that letter and request that you distribute one copy thereof, together with one of the enclosed copies of this letter, to each member of the panel assigned to this case. We are also sending copies of the instant letter and the letter of January 16, 1986, to counsel for parties and the *amici curiae* in this case.

Sincerely yours,

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Assistant Attorney General
Tax Division

By: /s/ Gary R. Allen
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16 Jan. 1986

Edward Mackiewicz
General Counsel
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2020 K Street, N.W.
Washington, D.C. 20006-1806

Dear Mr. Mackiewicz,

Rr: Amato, et al. v. Western Union, et al., 773 F.2d 1402 (2nd Cir. 1985)

This letter is in response to your request made at the meeting of January 10, 1986, that we furnish you with our views regarding the inapplicability of the *Amato* decision to situations involving plan terminations. Western Union has filed a petition for certiorari to the Supreme Court seeking review of the Second Circuit's decision that a 1982 plan amendment eliminating two unreduced early retirement benefit options was in violation of I.R.C. sec. 411(d)(6). The benefits affected in *Amato* are now protected in the context of both plan amendments and plan terminations by virtue of the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397, 98 Stat. 1426.

The concern you expressed was whether the court's holding that the plan amendment impermissibly reduced accrued benefits could be extended to plan terminations for the pre-REA period. We believe this different treatment for *Amato*-type benefits in plan amendment situations versus plan termination situations was recognized by Congress and does not expose the PBGC to any unforseen liability. The applicable statute, regulations, rulings, and legislative history cited by the Court as the basis for its holding make clear that pre-REA such bene-

fits were only protected by I.R.C. sec. 411(d)(6) from reduction by a plan amendment and not a plan termination.

At issue in *Amato* were ERISA sec. 209(g) and I.R.C. sec. 411(d)(6) which provide that:

> A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an *amendment* of the plan .... [Emphasis supplied.]

Shortly after the enactment of sec. 411(d)(6), the I.R.S. published Treas. Reg. sec. 1.411(d)-(3) dealing with the effect of plan amendments on accrued benefits. It states in relevant part:

> Under section 411(d)(6) a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan *amendment* decreases the accrued benefit of any plan participant, unless *the plan amendment* satisfies the requirements of section 412(c)(8) (relating to certain retroactive amendments) and the regulations thereunder. [Emphasis supplied.]

The Second Circuit found this interpretation of I.R.C. sec. 411(d)(6) as applied to plaintiffs' early retirement benefits to be "neither 'unreasonable [nor] plainly inconsistent with' the Code itself [citation omitted]", *Amato, supra*, at p. 1411. Therefore the I.R.S. interpretation protecting these benefits from decrease by plan amendments was found to be valid.

The court also directly noted Revenue Ruling 81-12, 1981-1 C.B. 228, in reaching its conclusion. The ruling states in relevant part:

> Section 411(d)(6) of the Code and section 1.411(d)-3(b) of the regulations do not preclude a change in the actuarial basis. They do, however, preclude a change from decreasing a participant's accrued benefit. If the actuarial basis is being changed by a *plan*

amendment and, as a result, any participant's accrued benefit may decrease, there are several acceptable methods that may be specified in the plan to prevent a decrease in an accrued benefit and a violation of section 411(d)(6) [Emphasis supplied.]

The ruling, like the regulation, only asserted the protection for these benefits from reduction by plan amendment. As enunciated in the amicus brief filed by the Department of Justice on behalf of the I.R.S. and as cited by the Second Circuit, the I.R.S. is the primary authority in construing the Internal Revenue Code ("Code"). *See Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983). In this role the I.R.S., in the absence of express legislative enactment, recognized that there was no authority to extend such protection to Amato-type benefits in the event of plan termination. In addition to its primary authority in interpreting the Code, long standing I.R.S. administrative practices such as those here "continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law [citations omitted]", *Amato, supra,* at p. 1411.

The I.R.S. policy of limiting the protection of these benefits only to the context of plan amendments is not only to be given great weight but is also borne out by the legislative history accompanying REA. In its initial consideration of the bill the House provided that sec. 411(d)(6) as reenacted state as follows:

(B) TREATMENT OF CERTAIN PLAN AMENDMENTS.—For purposes of subparagraph (A), a plan amendment which has the effect of—

(i) eliminating or reducing a subsidy or an early retirement benefit, or

(ii) eliminating an optional form of benefit, with respect to benefits accrued before the amendment shall be treated as reducing accrued benefits. *In the*

> *case of a terminated plan the preceding sentence shall not apply to a subsidy where the conditions for the subsidy have not been satisfied at the time of termination.* [Emphasis supplied.] H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 78 (1984).

The House Committee on Ways and Means reported that

> [i]n adidtion, present law provides that a qualified plan generally may not be *amended* in a manner that decreases the benefits of any participant accrued prior to the amendment [footnote omitted]. [Emphasis supplied.] H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 25 (1984).

The Committee then stated that I.R.S. rulings (i.e. Rev. Rul. 79-90, 1979-1 C.B. 155 and Rev. Rul. 81-12, *supra*) dealing with protection of these benefits in the context of plan amendments were to be codified.

> The bill codifies present law generally precluding the elimination or reduction of benefits that have already been accrued by employees. Although the bill prohibits the elimination or reduction of a benefit through a *plan amendment* . . . it does not prevent prospective changes in benefits. [Emphasis supplied.] H.R. Rep. No. 655, *supra*, 26-27.

When the bill moved to the Senate there was concern that *Amato*-type benefits should receive the same treatment when affected by plan termination as when affected by plan amendment under prior law.

> The [Senate] bill does not provide an exception to the prohibition against reduction of benefits or elimination of benefit options in the case of a terminated plan. Accordingly, a plan is not considered to have satisfied all of its liabilities to participants and beneficiaries until it has provided for payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan,

> meets the requirements for a subsidized benefit. S. Rep. No. 575, 98th Cong. 2d Sess. 28, *reprinted in* 1984 U.S. Cong. & Ad. News 2547.

In light of this important change the Senate Report noted that the bill clarifies the scope of the prohibition against "decreases in the accrued benefit of a participant but that the committee intends that no inference is to be made on the basis of this clarification as to the scope of the prohibition before the effective date of the provision." S. Rep. No. 575, *supra.*

When the bill returned to the House for reconsideration Rep. Roukema, cosponsor of the bill and ranking Republican on the Subcommittee on Labor-Management Relations, noted that the bill as amended by the Senate to now apply to *Amato*-type benefits upon termination went far beyond the original House codification of Rev. Ruls. 79-90 and 81-12.

> It should be noted that while this bill, as amended by the other body, retains the major features of the House passed legislation, as a result of the Finance Committee action the bill contains an *important change in current law* having a far-reaching effect in eliminating currently perceived abuses occurring when overfunded pension plans are terminated and the excess assets revert to the employer. As described in the technical explanation of H.R. 4280 reported by the Committee on Finance a plan is not to be considered, pursuant to section 301 of the bill, to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit. *This change from present law* means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will not have to be allocated to participant

> benefits. [Emphasis supplied.] 130 Cong. Rec. H8763 (daily ed. August 9, 1984).

While the legislative history of a subsequent Congress is not necessarily determinative for inferring the intent of an earlier one, *see Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980), "such views are entitled to significant weight and particularly so when the intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Subsequent legislative history is accorded even greater weight where such history consists of explicit statements as to statutes unchanged during the period in question and where members of the applicable committees were present during that period. *See Walt Disney Productions v. United States*, 480 F.2d 66 (9th Cir. 1973). In addition, via reenactment and extention of an existing statute Congress may be deemed to sanction existing I.R.S. regulations and rulings. *See, e.g., Hejvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939).

In 1974 Congress did not address with clarity the issue of either plan amendments or plan terminations and their effect on unreduced early retirement benefits. The I.R.S. in its role as interpreter of the Code therefore extended the protection against reduction of *Amato*-type benefits by plan amendment only as far as the statute allowed. The explicit statements of veteran committee members also acknowledged the pre-REA limits of sec. 411(d)(6) as applied by the I.R.S. Accordingly, the legislative history describing this section which recognizes this pre-REA distinction is entitled to great weight.

It is also clear that treating *Amato*-type benefits as accrued benefits does not affect the liability of the PBGC as to these benefits either pre or post-REA.

> To the extent that participants meet the plan requirements for eligibility for benefits after the date of plan termination even though these benefits are

> treated as accrued benefits under section 301, the benefits are not to be allocted to the four asset priority categories set forth in ERISA section 4044(a)(1) through 4044(A)(4.) Such benefits may be allocated to subsequent asset priority categories, however. 130 Cong. Rec. H8756 (daily ed. August 9, 1984).

The *Amato*-type benefits would not be allocated to these four categories and thus would not affect PBGC liability.

In certain circumstances a participant may satisfy the conditions of a subsidized benefit prior to plan termination after a plan amendment has eliminated such benefit. Under *Amato* the subsidized benefit already accrued at the time of plan amendment would be protected and, if conditions are subsequently satisfied, would upon plan termination be given a higher priority category via ERISA secs. 4044(a)(1) through (a)(4). If the plan terminated with insufficient assets then PBGC liability for this benefit might be affected. Nonetheless, any liability is expected to be de minimis and, as evidenced by the legislative history, and resulting liability is consistent with recognized I.R.S. position.

Western Union's second argument in its petition for certiorari deals with the court's statement that ERISA sec. 4044(a)(6), describing the sixth asset allocation caegory on plan termination, is not limited to accrued benefits. Regardless of the validity of this statement we believe it does not affect PBGC liability for such benefits nor raise a question of sufficient importance justifying Supreme Court review. As noted previously, the legislative history indicates that the absence of PBGC liability for *Amato*-type benefits remains unchanged from prior law. Additionally, the I.R.S. in its application of sec. 411(d)(3) has applied the partial termination rules only to accrued benefits to the extent funded and not to all "other benefits". Finally, the court's statement regarding the scope of ERISA sec. 4044(a)(6) constitutes, at best, *obiter dicta* and therefore does not represent binding

precedent. *See In re Grand Jury Matter*, 768 F.2d 525 (3rd Cir. 1985); *Lowder v. United States*, 492 F.2d 953 (4th Cir. 1974). *Obiter dicta* are "words of an opinion entirely unnecessary for the decision of the case". *Black's Law Dictionary*, 5th Ed. (1979). The Second Circuit having already determined that plaintiffs' benefits were accrued benefits did not need to discuss the scope of ERISA sec. 4044(a)(6) and therefore such discussion constitutes *obiter dicta*.

In conclusion we believe the legislative history discussing the I.R.S. pre-REA interpretation of I.R.C. sec. 411 (d)(6) amply supports the conclusion that the protection of that section cannot be extended to *Amato*-type benefits in plan termination situations. The favorable result obtained in *Amato* is important for the I.R.S. enforcement of protection of plan participants from reduction of their accrued benefits via plan amendment for the pre-REA period. At the same time this important result does not extend to plan terminations and does not increase the potential liability of the PBGC. Therefore *Amato* is properly limited to the facts arising therein.

We look forward to our agencies reaching an agreed position on this issue so we may soon inform the respective litigants of our decision.

Sincerely,

/s/ Robert I. Brauer
ROBERT I. BRAUER
Acting Assistant Commissioner
(Employee Plans and Exempt
(Organizations)

FRED T. GOLDBERG, JR.

By: /s/ Daniel F. Folzenlogen
DANIEL F. FOLZENLOGEN
Special Appellate Counsel

BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-3858

B.E. TILLEY, *et al.*,
Plaintiffs-Appellants,

v.

THE MEAD CORPORATION,
Defendant-Appellee.

On Remand from the Supreme Court of the United States

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BRIEF OF AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation established by section 4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302, to administer and enforce the provisions of Title IV of the statute. The agency's Board of Directors is composed of the Secretaries of Labor, Treasury, and Commerce. *Id.* Title IV of ERISA, 29 U.S.C. §§ 1301-1461,

governs the termination of defined benefit pension plans. The single-employer pension plan termination insurance program in Title IV covers over 30 million participants in more than 110,000 defined benefit pension plans voluntarily established by employers in the private sector.

This case is before this Court on remand from the Supreme Court of the United States. It involves important issues under Title IV. In particular, the case involves section 4044 of ERISA, a key provision governing the allocation and distribution of pension plan assets at plan termination. Section 4044(a) establishes six priority categories of benefits to which assets must be allocated in succession when a plan terminates. The last of these categories, section 4044(a)(6), provides for the allocation of assets to "all other benefits [not provided under categories 1 to 5] under the plan." 29 U.S.C. § 1344(a)(6). Section 4044(d)(1) then permits the distribution of any residual assets to the employer if, *inter alia*, "all liabilities of the plan . . . have been satisfied," and "the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1)(A), (C).

The plaintiffs in this case rely on section 4044 to claim entitlement to certain subsidized early retirement benefits under the Mead Industrial Products Salaried Retirement Plan ("Plan"), even though they did not qualify for those benefits when the Plan terminated. In their view, their employer, The Mead Corporation ("Mead"), was not entitled to a reversion of residual assets until such benefits were paid. However, from the time it was established in 1974 until after the enactment of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), the PBGC did not include unearned early retirement subsidies as "accrued benefits" within category six at plan termination. *See* 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975). Therefore, PBGC did not require the payment of such benefits as liabilities under section 4044(d)(1)(A) before a reversion of residual assets.

Nor did the Internal Revenue Service ("IRS") consider such benefits as termination liabilities prior to REA.

In its initial decision in this case, a panel of this Court held that section 4044(a)(6) required the payment of unearned, subsidized early retirement benefits even if those benefits were not accrued at the time of plan termination. *Tilley v. Mead Corp.*, 815 F.2d 989, 992 (4th Cir. 1987) (*reh'g denied*). The Supreme Court reversed that decision, but remanded the case for consideration of the plaintiffs alternative arguments in support of their claim for unreduced early retirement benefits: (1) whether unreduced early retirement benefits are "accrued benefits" under ERISA; and (2) whether unreduced early retirement benefits are "liabilities" within the meaning of section 4044(d)(1)(A) that must be satisfied before a reversion ocurs. *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989). The Supreme Court was "reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers" without the views of "the agencies responsible for enforcing ERISA." *Id.* Accordingly, the Supreme Court directed this Court to "consider the views of the PBGC and the IRS." *Id.*

On remand, the PBGC filed an *amicus curiae* brief addressing both remanded issues, and participated in oral argument. Although the IRS did not file a brief, it made its views on the issues known to the Court prior to oral argument by way of a letter to the Clerk dated December 27, 1989, from the Chief of the Appellate Section, Tax Division, United States Department of Justice ("DOJ Letter"). Consistent with the views expressed in the PBGC's brief and the DOJ letter, the panel unanimously concluded that the unearned subsidized early retirement benefits at issue are not "accrued benefits" within the meaning of ERISA or the Internal Revenue Code ("Code").[1]

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[1] Because this case is governed by the law in existence in 1983, citations to the Code in this brief refer to the Internal Revenue Code of 1954 in effect in 1983, unless specifically noted.

However, Judge Murnaghan, writing for a majority of the panel (Judge Widener concurred), declined in Part III of the opinion to "adjudicate the issue, beset with problems," of whether the unearned subsidies are "liabilities" within the meaning of Section 4044(d)(1)(A) of ERISA. Maj. Op. at 11.[2] Instead, the majority decided, with reference only to section 4044(d)(1)(C) of ERISA, that the terms of the plan itself require the payment of subsidized early retirement benefits in this case. In the majority's view, it is unnecessary to look to other provisions of ERISA or the Code because the benefits at issue here are "contingent rights" within the meaning of the plan document and the excess assets that reverted to Mead were not "due to actuarial error" as required by the Plan. Maj. Op. at 13-17.

The PBGC supports Mead's petition for rehearing and suggestion for rehearing en banc with respect to Part III of the majority opinion. Rehearing is warranted because, as Judge Chapman stated in his dissent, the majority disregarded the Supreme Court's mandate to address the question whether unearned subsidized early retirement benefits are "liabilities" within the meaning of section 4044(d)(1) of ERISA. The majority also disregarded the terms of ERISA and the Code, instead interpreting terms of art in the Plan by reference to everyday meanings. Dis. Op. at 21-22, 35-38. In doing so, the majority necessarily "discard[ed] the views submitted by the amici curiae," including PBGC and various actuarial associations, and "ultimately delay[ed] the development of the law." Dis. Op. at 22. In fact, the majority dismissed these important considerations as nothing more than "a mishmash of statutory provisions, regulations, legislative history, and actuarial lore." Maj. Op. at 11.

Finally, the majority failed to consider a development in the law subsequent to the Supreme Court mandate:

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[2] The majority opinion of the Panel will be cited as "Maj. Op." and the dissenting opinion as "Dis. Op."

the January 29, 1991 decision of the United States Court of Appeals for the Third Circuit in *Nobers, et al. v. Crucible Inc. 1975 Salaried Retirement Plan,* Nos. 90-3463, 90-3540 (3d Cir. 1991) ("*Nobers*"), holding unanimously that unearned subsidized early retirement benefits are not "liabilities" of the plan under section 4044(d)(1)(A).[3] In reaching this decision, the *Nobers* panel accorded considerable deference to the views of the PBGC. By failing even to consider those views in the instant case, the majority has created a conflict.

ARGUMENT

THE MAJORITY'S DISPOSITION OF THE "LIABILITIES" ISSUE DISREGARDS THE DIRECTIONS OF THE SUPREME COURT AND THE VIEWS OF THE ADMINISTERING AGENCIES, AND IS INCONSISTENT WITH THE PANEL'S HOLDING ON THE ACCRUED BENEFITS ISSUE

Relying on the language of Article XIII, § 4(f) of the Plan, a majority of the panel decided that plan assets could not revert to Mead before payment of the pensioners' subsidized early retirement benefits because: "(1) the funds in the Plan that have been set-aside in expectation of fulfilling the[se] . . . benefits did not remain in the Plan 'due to actuarial error'; and (2) the benefits at issue are 'contingent rights' that must be paid prior to any reversion." Maj. Op. at 14.

The majority decision ignores the Supreme Court's mandate to analyze the meaning of "liabilities" under section 4044(d)(1)(A) of ERISA. It ignores the well-established meaning of the term "liabilities" under section 4044 of ERISA, and section 401(a)(2) of the Code and Treasury regulations thereunder. And, finally, the

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[3] By letter dated February 14, 1991, counsel for Mead sent a copy of the *Nobers* opinion to the Clerk of this Court, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure.

decision ignores the views of the PBGC and the IRS, as well as the views of other *amici* based on their historical practical experience.[4] The majority rests its decision instead on "the lay world" definition of "contingent" in *Webster's New Collegiate Dictionary* and *Black's Law Dictionary*, Maj. Op. at 16. The decision accordingly well illustrates the folly of "reading technical pension language as if it were ordinary English." *Wise v. Ruffin*, 914 F. 2d 570, 575 n.5 (4th Cir. 1990) (Murnaghan, J.), quoting *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977).

Section 4044(a) provides rules for the allocation of assets upon plan termination. Once the assets are allocated in accordance with section 4044(a), section 4044(d)(1) authorizes the reversion of any residual assets to employers if, *inter alia*, "all liabilities of the plan to participants and their beneficiaries have been satisfied." As the PBGC argued in its *amicus* brief and the Third Circuit held in *Nobers*, the "liabilities of the plan" that must be satisfied under section 4044(d) of ERISA are "coextensive with the benefits included in the priorities of section 4044(a)." *Nobers*, slip op. at 4-5. Thus, "if a benefit is not required to be assigned to an asset allocation category under section 4044(a)(1)-(6), there can be no liability for that benefit under section 4044(d)(1)(A)." *Id.*

Unaccrued benefits are not included in any of the section 4044(a) priority categories. Indeed, as the Su-

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[4] Indeed, as the dissent points out, the majority ignores even the very terms of the Plan upon which it purports to rely. The Plan requires the payment, prior to the reversion, of "contingent rights *accrued* under the Plan." (Emphasis added.) In relying on dictionary definitions, however, the majority reads the word "accrued" right out of the Plan, disingenuously reasoning that to do otherwise would be to give credence to an oxymoron. Maj. Op. at 17. As the dissent states, such a construction "is clearly improper when ERISA and the Code, and their regulations, make feasible an interpretation that gives meaning to each and every word in the Plan." Dis. Op. at 38.

preme Court held, section 4044(a) "in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits." 490 U.S. at 722. Thus, the panel's unanimous decision that unearned subsidized early retirement benefits are not "accrued benefits" leads ineluctably to a conclusion that such benefits cannot be "liabilities" within the meaning of section 4044(d)(1)(A). To conclude otherwise, as the majority did, is to assume "that the word 'liabilities' in § 4044(d)(1)(A) has a substantive meaning of its own." Dis. Op. at 24. It does not. Instead, like section 4044(a), section 4044(d) is merely a distribution mechanism, and not a source of new entitlements. *See* 490 U.S. at 723. Therefore, the only source of liabilities under section 4044(d) "is the accrual and vesting provisions outlined in Title I, which sets forth an elaborate framework to determine an employee's right to benefits." Dis. Op. at 24.

The result is the same under Code section 401(a)(2), the counterpart to Section 4044(d)(1)(A) of ERISA. Like Section 4044(d), section 401(a)(2) does not create liabilities. Rather, under Code section 401(a)(2), the only sources of liabilities are the benefit accrual and vesting provisions of section 411 of the Code, the benefits required by Code section 401(a)(11), and the terms of a plan. Of course, section 401(a)(2) and the regulations thereunder (particularly Treas. Reg. § 1.401-2(b)) provide for the satisfaction of all "fixed and contingent" liabilities. This rule pre-dated ERISA, and was not changed by the enactment of that statute. However, under Treas. Reg. § 1.401-2(b) and Rev. Rul. 61-157 (which required vesting on termination), fixed liabilities were benefits for which participants had met all requirements for entitlement prior to plan termination. Contingent liabilities were those benefits accrued prior to termination to which employees might have become entitled had the plan continued. Thus, as the dissent notes, the "contingent liabilities" referred to in the series of pre-ERISA Revenue Rulings are the "benefit credits *accrued* up to

the time of termination." Dis. Op. at 26-27 (emphasis added).[5] Consequently, under the Code as under ERISA, if the subsidies are not accrued benefits, then they are not liabilities." *Id.*

The majority, of course, deliberately disregarded these longstanding ERISA and Code provisions and principles. The opinion of the dissent, on the other hand, is fully consistent with the manner in which both the PBGC and the IRS administered their respective statutes prior to the 1984 enactment of REA. Before REA, the PBGC did not require the payment of unearned, subsidized early retirement benefits as liabilities under section 4044(d)(1)(A) before a reversion could occur. And, before REA, it was the consistent practice of the IRS in reviewing plan terminations to treat early retirement benefits as outside the scope of Section 401(a)(2) of the Code, notwithstanding that such benefits constituted "accrued benefits" for plan amendment purposes under section 411(d)(6) of the Code. *See* DOJ Letter; Rev. Rul. 83-52.

The majority similarly ignored the longstanding Code definition of "actuarial error." In the majority's view, the term references only "computational error resulting from inaccurate statistical assumptions." Maj. Op. at 14. But, as the dissent stated, "the majority analyzes this term in a vacuum, deliberately ignoring the term's obvious origins in Treas. Reg. § 1.401-2(b)." That regulation, like Rev. Rul. 83-52, adopts a broad construction of the term "erroneous actuarial computation" and uses it interchangeably with the term "actuarial error." The majority therefore should at least have considered the long-

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[5] These pre-ERISA Revenue Rulings were merely a precursor of the present day Code section 411(d)(3), requiring vesting upon termination. All that requirement means is that a participant must vest at plan termination in the pro rata portion of his or her normal retirement benefit accrued up to that point, to the extent that benefit was then funded. These "accrued" normal retirement benefits are the "contingent obligations" referred to in Treas. Reg. § 1.401-2(b)(2), the fixed obligations being those of participants who had met all of the conditions required to receive a benefit.

standing IRS construction. It is simply inconceivable that the drafters of the Mead Plan intended by that term anything other than the meaning attached to it by the IRS.[6]

Finally, the majority disregards the import of the REA amendments to ERISA in 1984. In the majority's view, those amendments are merely "another complication" in this case. It goes on to speculate that the law "might have been enacted" to remove uncertainty. Maj. Op. at 12 n. 3. By contrast, the dissent fully analyzes the effect of REA, noting that its enactment would have been redundant if ERISA had already provided the rights that the plaintiffs claim. Indeed, plaintiff's claims go beyond what REA requires, and, if credited, mean that REA actually reduced the protections afforded to early retirement subsidies, a result that the dissent correctly noted is "unlikely." Dis. Op. at 35.

The logic of the dissent, which is firmly based on the interpretations and administrative practices of the PBGC and the IRS prior to REA, is compelling. No provision of ERISA or the Code creates the benefit entitlements the majority awarded here. Nor can section 4044(d)(1)(C) or the Plan's terms be read in a vacuum to provide plaintiffs the benefits they claim. Because the majority's everyday construction of terms of art used in the Plan does violence to the established meaning of those terms under the Code and ERISA, its opinion in effect resuscitates the result of the original panel decision, which the Supreme

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[6] As noted by Mead in its Petition for Rehearing, the majority's approach to interpreting the Plan provision in issue overlooked the opinion of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and various opinions of this Court construing the appropriate standard of review of plan administrators' interpretations of plan language under the *Bruch* doctrine. While that argument is beyond the scope of the PBGC's brief, we note that PBGC would regard as reasonable a plan administrator's construction of plan language that was consistent with the established meaning of terms of art under ERISA, the Code, and rulings and regulations thereunder. *See* Dis. Op. at 35-38.

Court reversed. Moreover, the majority opinion elevates mere benefit expectations under a plan into entitlements, a theory soundly rejected by the Eleventh Circuit sitting *en banc* in *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1175 (11th Cir. 1988). It should not be permitted to stand.

CONCLUSION

Based upon the foregoing PBGC respectfully submits that the Court should grant rehearing and rehearing en banc and that Part III of the decision of the panel should be reversed.

Respectfully submitted,

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No. 91-356

IN THE

Supreme Court of the United States

October Term, 1991

THE MEAD CORPORATION,
Petitioner

vs.

B.E. TILLEY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF ACTUARIES AND AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONER

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The American Academy of Actuaries and the American Society of Pension Actuaries submit this brief, as amici curiae, pursuant to Rule 37 of the Rules of the Supreme Court of the United States in support of petitioner in No. 91-356, having obtained the written consent of both the petitioner and the respondents to file same. Said written consent accompanies this brief.

I. STATEMENT OF INTEREST OF AMICI CURIAE

The American Academy of Actuaries (the " Academy") is a nonprofit professional organization of actuaries formed in 1965 to bring into one organization actuaries of all specialties within the United States, and to seek accreditation and greater public recognition for the profession. In order to join the Academy, prospective members must satisfy rigorous education and experience requirements. The Academy's main focus is the economic, public policy and social environment in which the actuarial profession functions. Its primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice. The current membership exceeds 10,000.

The American Society of Pension Actuaries ("ASPA") is a nonprofit organization whose membership consists of more than 3,000 persons engaged in the design and administration of retirement plans, and in providing both actuarial and consulting services with respect to such plans. Its membership includes enrolled actuaries, certified pension consultants, plan administrators, attorneys, accountants, and others concerned with the private pension system. ASPA has as one of its primary purposes the preservation and growth of the private pension system.

II. INTRODUCTION

The Fourth Circuit below erroneously redefined the liabilities that must be paid to employees before a reversion may be paid to an employer when any overfunded pension plan terminates. In its opinion the court below fundamentally distorted two key concepts utilized by the actuarial profession in deter-

mining the proper disposition of pension trust funds upon termination of any pension plan under the Employee Retirement Income Security Act ("ERISA"). As we told the court below in our amicus brief supporting rehearing and rehearing en banc, the Mead Plan incorporated both of these concepts, and "Mead's Plan and all others contain virtually identical terms regarding the . . . liabilities that must be paid before a reversion of surplus assets can occur."

First, the Fourth Circuit majority rendered meaningless the term "actuarial error" which, until this decision, was uniformly understood to be — and was defined by the Internal Revenue Service ("IRS") to be — merely the difference between an overfunded plan's assets and its liabilities, i.e., the surplus which may, if the plan so provides, be recovered by the sponsor when the plan terminates. The court below held that "actuarial error" cannot encompass sums contributed to a plan to fund future plan benefits that later do not become payable because the plan terminated before plan participants had earned the benefits. In point of fact, it is just such contributions that have been the primary source of reversions to employers in thousands of plan terminations approved by both the IRS and the Pension Benefit Guaranty Corporation ("PBGC"), the two agencies which share regulatory authority in this area. Therefore, the majority's mistaken view of "actuarial error" — if allowed to stand — would have the extremely serious effect, in most cases, of outlawing the reversion of surplus assets.

Second, the opinion below misconstrues an IRS regulation and related rulings which are part of the regulatory framework establishing a plan's liabilities upon termination. Those liabilities have never been understood by the actuarial profession (or by IRS and PBGC) to include benefits that have not been earned under the terms of the plan as of the time of plan termination. The decision below, however, interprets a portion of a

1943 IRS regulation to require that one type of such unearned benefits — unearned subsidized early retirement benefits — be regarded as "contingent" plan liabilities payable upon plan termination. Since most pension plans contain some form of early retirement benefits, as well as other benefits that are payable only after certain specified plan requirements are met, the Fourth Circuit majority's decision casts doubt on the correctness of the calculation of the benefits paid under thousands of plans that have terminated. Indeed, the court's holding effectively nullifies the Retirement Equity Act of 1984 ("REA") which prospectively amended ERISA to require that early retirement subsidies become plan liabilities — but only if and when they are fully earned by continued service with the plan sponsor, after plan termination.[1]

The majority received but did not consider the views of the IRS and the PBGC, the agencies responsible for administering the portions of ERISA and the Internal Revenue Code which are pertinent here. The views of those agencies are not only relevant, but are entitled to great weight. The agencies' views are completely at odds with the decision below.

III. BACKGROUND

In 1983 Mead sold its subsidiary, the Lynchburg Foundry Company (the "Foundry"), terminated the pension plan covering the Foundry's salaried employees (the "Mead Plan"), and took an $11 million reversion of surplus plan assets.

[1]REA's effective date was July 30, 1984. It does not apply to the plan termination at issue in this case, which took place in 1983. However, as explained *infra* at 16-17, by failing to recognize the conflict between its decision and REA, the court below created intolerable problems for administering plan terminations to which REA does apply.

The Mead Plan provided a normal retirement benefit at age 65. It also contained an unreduced or "subsidized" early retirement benefit for employees with 30 years of service who retired after age 62;[2] the subsidized benefit was payable immediately upon early retirement and was equal to the portion of the age 65 normal retirement benefit earned to date with no actuarial reduction on account of early payment. Only employees who had met the criteria for receiving this subsidized benefit received it when the Plan terminated. The central question in this case is whether, before a reversion of surplus assets can occur, ERISA or the Internal Revenue Code requires that any part of the subsidized early retirement benefit must be paid as a plan liability to participants who do not satisfy the plan's age and service requirements for earning that benefit.

Both the IRS and PBGC have answered this question in the negative — unearned early retirement benefits do not have to be paid upon termination of a pension plan. Plan actuaries and other professionals, following the guidance of the regulatory authorities, have consistently given the same advice in tens of thousands of plan terminations. The court below disagreed. While the precise legal basis for its decision is unclear, the court below embraced the notion that, since the surplus assets that were returned to Mead contained sums that were originally contributed by Mead to provide benefits the respondents expected to receive at some future time, and since Mead — not the respondents — terminated the plan, the respondents should be entitled to some of the surplus.

[2]Plan Art. § 2(b) (Petitioner's Appendix ("App.") 94a.)

[3]Because the monthly benefit is not reduced to take into account the additional payments to be made before age 65, a subsidized benefit is more valuable than the participant's accrued normal retirement benefit which provides the same payments beginning at age 65.

This case has been before the court below twice, and before this Court once. Upon its first consideration of this case in 1987, the Fourth Circuit focused upon § 4044(a)(6) of ERISA which requires that plan assets be used to satisfy "all other benefits under the plan" before a reversion can occur. The court below held that that section of ERISA required unearned subsidized early retirement benefits to be paid "even if those benefits were not accrued at the time of plan termination," quoting with approval the Second Circuit's opinion in *Amato v. Western Union Intern'l., Inc.*, 773 F.2d 1402 (1985), which stated that "as long as assets were available, they should be used to meet participants' benefit expectations . . . ." 773 F.2d at 1416. This Court granted certiorari and reversed. *Mead Corp. v. Tilley*, 490 U.S. 714 (1989) (App. 33a). On remand to the Fourth Circuit, a majority of the panel below held that the provisions of the Mead Plan incorporating IRS regulations requiring that all surplus assets that revert to the employer be due to "actuarial error" and requiring that "contingent" liabilities be satisfied upon plan termination meant that "employees who, with reason, expected to receive the unreduced early retirement benefits" (App. 12a) must prevail again.[4] The court below reached that result in spite of the fact that the IRS and the PBGC advised the court that those regulations did *not* require that unearned early retirement subsidies be paid before a reversion can take place.

The Fourth Circuit's opinion is wrong. Unless reversed, it poses a major threat to the viability of defined benefit pension plans.

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[4]The Fourth Circuit majority's decision also seems to conflict with the lone dissenting opinion written by Justice Stevens when this case was last before this Court. Although Justice Stevens' dissent is not completely clear, he would apparently require participants in the Mead Plan to have had 30 years of service prior to the date of plan termination and to reach age 62 in order to receive any early retirement subsidy from the Plan (App. 46a).

IV. THE THEORY BEHIND THE DECISION IS WRONG

The Fourth Circuit's theory that pension funds exist to satisfy participants' benefit expectations, and that such expectations must always be satisfied when a plan terminates with excess assets reflects a serious misunderstanding of how defined benefit pension plans, such as the Mead Plan, work.

Every pension plan is either a defined benefit or defined contribution pension plan. (ERISA § 3(35)). Defined benefit plans provide benefits which are typically calculated by a formula which states or "defines" the plan benefit, e.g., $100 per month for each year of service at age 65. Contributions to a defined benefit plan are calculated by choosing an actuarial funding method and actuarial assumptions regarding such factors as investment return on contributions, employee turnover, and compensation projections.[5] Each year the plan's actual experience is compared with the assumptions and the employer's ensuing contribution is adjusted — up or down — to compensate for assumptions that proved to be too high or too low. If, for example, the assumed investment return is 8 percent and the actual return for a particular year is 6 percent, the employer's future contributions will be increased so that funds will be adequate to pay benefits as they become due.[6] Because benefits are paid according to the plan's formula, no particular part of the pension fund is earmarked for any one participant.

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[5]*See*, Allen, Melone, Rosenbloom, and VanDerhei, ***Pension Planning***, Ch. 8 (6th Ed. 1988). Assumptions for each type of benefit differ. For example, an actuary would typically assume far fewer employees would ultimately qualify for a benefit payable upon retirement after age 62 and 30 years of service than would qualify for the regular age 65 pension which requires no minimum years of service. Actuarial assumptions are also based on the the premise that the plan is an ongoing entity and will not terminate.

[6]In fact, the actuarial assumptions themselves are reviewed periodically and changed if necessary in light of plan performance.

By contrast, in a defined contribution plan, the employer's annual contribution is allocated among individual participants' accounts[7] and invested by the plan's trustee. Participants are not promised any particular level of benefit; the benefit each receives is simply the amount of contributions allocated to his or her individual account, increased or decreased to reflect investment return. Unlike a defined benefit plan, the employer does not make up poor investment returns with increased contributions — participants simply receive a smaller benefit.

It is often said — correctly — that in a defined benefit plan, such as the Mead Plan, the risk of loss or reward of gain is borne by the employer; in a defined contribution plan the risks and rewards are borne by the employee.

When a defined benefit plan terminates, if plan assets exceed benefit liabilities, the excess assets may be returned to the employer. ERISA § 4044(d)(1)(A); IRC § 401(a)(2). When a defined contribution plan terminates, there are no excess assets and no reversion is possible because benefits simply equal the amounts in all participants' accounts.

The Fourth Circuit's majority opinion, as Judge Chapman's dissent recognizes (App. 23a-24a), seeks to impose defined contribution plan characteristics upon defined benefit plans by requiring the employer to share excess plan assets with employees who have not earned them by satisfying the plan's explicit benefit criteria. It does so on the theory that if the benefits have been funded for employees who expected them, the employees' expectations should not go unfulfilled.[8]

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[7]The allocation is usually based on each participant's prorata compensation.

[8]No fewer than seven times in its decision, the court below referred to the parties' "expectations" concerning unreduced early retirement benefits. *(See*, App. 12a, 13a).

That theory is deeply flawed. If the benefits were not "expected" — at least in the actuarial sense — they would not have been funded in the first place. That there are excess assets upon plan termination simply means that the actuarial assumptions turned out to be too conservative in light of the benefits actually earned at the time of the plan's termination. The Fourth Circuit has created an intolerable rule that requires an employer to bear the burden of increased contributions when assumptions prove to have been too optimistic, while mandating that the employer also give up the excess at termination when the plan's performance has exceeded the actuarial assumptions and resulted in surplus assets.

V. THE FOURTH CIRCUIT'S OPINION MISINTERPRETS IRS REGULATIONS AND CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEAL

The decision below focuses on the provisions of the Mead Plan which implement a 1943 IRS regulation regarding plan terminations. That regulation was promulgated under what is now section 401(a)(2) of the Internal Revenue Code of 1986 ("IRC"). IRC § 401(a)(2) prohibits a reversion of pension trust funds to the employer "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries."[9] Two aspects of the regulation, and IRS rulings under it, are at issue here.

[9]Similarly, ERISA § 4044(d)(1)(A) provides that residual plan assets may revert to the employer only if "all liabilities of the plan to the participants and their beneficiaries have been satisfied." The liabilities that must be satisfied under IRC § 401(a)(2) and ERISA § 4044(d)(1)(A) are the same. *See*, Mead's Petition for Certiorari at 3-4 and PBGC's Brief in Support of Mead's Petition for Rehearing and Suggestion for Rehearing En Banc (App. 187a).

A. The Requirement That Surplus Funds Be Attributable to Actuarial Error.

IRS regulations explain that IRC § 401(a)(2) permits the employer upon plan termination to recoup the trust balance due to "erroneous actuarial computation" or, stated another way, "the surplus arising because actual requirements [of the trust] differ from the expected requirements." Treas. Reg. § 1.401-2(b)(1) (App. 73a). The Mead Plan thus provides for the return of "any surplus remaining in the Retirement Fund due to actuarial error". Art. XIII, § 4(f) (App. 122a). As is obvious from the regulation, and, as IRS rulings confirm, the term "actuarial error" is simply shorthand for the difference between the plan's assets and liabilities: "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error and revert to the employer." Rev. Rul. 83-52, 1983-1 C.B. 87 (App. 74a).

The Fourth Circuit, however, chose to ignore the plain import of the IRS regulation and revenue ruling and decided that

> '[a]ctuarial' error seems to reference computational error resulting from inaccurate statistical assumptions. If the Plan's actuary had used precise statistical assumptions regarding the future value of Plan assets and the requirements of its beneficiaries, the Plan would have contained a surplus upon termination — the amount contributed in expectation of satisfying the pensioners' unreduced early retirement benefits, which Mead later decided not to pay. (App. 12a).

The court below was confused. Had the actuaries used "precise statistical assumptions", including an accurate prediction of the precise date on which the plan would terminate, there would have been no surplus and no reversion. The IRS, in defining "actuarial error" as it did in Revenue Ruling 83-52,

knows and understands this. The Assistant Commissioner of the IRS has explained that ruling as follows:

> Even though upon plan termination there are excess assets which are considered to result from erroneous actuarial computations, that does not mean that mistakes in the usual sense were made by actuaries. In estimating the actual future benefits that will be provided under a plan, the actuary makes many assumptions as to future investment earnings, mortality, employee turnover, salaries, and so forth, generally on the basis that the plan will not terminate.
>
> As I have described earlier, at a particular point in time under some level funding methods, the plan assets will exceed the value of accrued benefits. In addition, actuarial assumptions are almost never exactly or precisely realized, and in many cases actual experience may have been more favorable than assumed, such as investment performance exceeding that which was assumed. In such cases, actual plan assets may exceed expected plan assets. If such plans terminate with excess assets, the erroneous actuarial computation results primarily because the termination of the plan was not assumed when the computations were made.[10]

Other courts that have considered this issue agree. See, Mead's Petition for Certiorari at pp. 19-20. Thus, the IRS recognized that "actuarial error" can occur as a result of correctly calculating contributions if at the time of plan termination the plan's assets exceed the benefits earned to date. The majority below, however, concluded exactly the opposite, in-

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[10]Plan Asset Raid Hearing Before the Select Committee on Aging, House of Representatives, 98th Cong., 1st Sess., 104 (1983) (statement of S. Allen Winbourne, Asst. Commr.).

terpreting "actuarial error" to *exclude* "correctly calculating the contribution to a fund" when, in the court's view, that contribution is for "paying a benefit that the company later decides to cancel." (App. 13a).[11]

The majority's view of "actuarial error" was obviously influenced by its theory that benefit expectations should not go unfulfilled if there are funds available to meet them, especially if the plan is unilaterally terminated by the sponsor. As we have shown above, that theory is incorrect and without legal basis.

B. The Requirement That A Terminating Plan Discharge Contingent Obligations.

IRS regulations further require that the liabilities that must be satisfied upon plan termination under IRC § 401(a)(2) include a plan's "contingent" obligations. As even the court below recognized (App. 13a), there are obligations to all employees who are covered by a terminating plan, not just to those who have already retired. IRS regulations provide:

> [I]f 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute 'liabilities'. . . .

Treas. Reg. 1.401-2(b)(2) (App. 73a).

[11]The majority's opinion is sprinkled with hints that Mead should be punished for its actions, as is evident from its references to benefits "Mead later decided not to pay" (App. 12a) or "the company later decides to cancel" (App. 13a). In fact, the Mead Plan, as do most, permitted termination by Mead at any time. *See*, Art. XIII, § 4(a) (App. 122a). In this case the plan was terminated because Mead's subsidiary was sold to another company, an act hardly deserving punishment.

In five revenue rulings since the regulation was promulgated, the IRS has defined those "contingent obligations" to be the "benefit credits accrued" under a plan at the time of its termination. Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274; Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138; Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79; Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110; Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69. In order to comply with the regulation and rulings, the Mead Plan provided for a reversion of surplus assets "after the satisfaction of all benefit rights or contingent rights accrued under the Plan. . . ." (App. 122a). The majority below held that since the Plan's subsidized early retirement benefit was payable upon the completion of age and service requirements, it was a contingent liability under the "plain meaning" of the regulation and the Plan. (App. 14a).[12]

The majority, however, inexplicably ignored the word "accrued" — which appears in both the Mead Plan and the IRS revenue rulings — finding instead that "contingent rights accrued" could not possibly refer to early retirement subsidies

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[12]In 1962, the IRS agency position that all accued benefits must become fully vested upon plan termination was codified in IRC § 401(a)(7), later renumbered by the enactment of ERISA as IRC § 411(d)(3). In a different and unanimous portion of its decision (which is not at issue here), the court below correctly held that early retirement subsidies are not included within the scope of IRC § 411(d)(3) "accrued benefits." *See,* App. 6a. Other courts have agreed that early retirement subsidies are not accrued benefits. *See, Bencivenga v. W. Pa. Teamsters & Employers Pension Fund,* 763 F.2d 574, 580 (3d Cir. 19 85), *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan,* 854 F.2d 1516, 1525 (3d Cir. 1988), cert. denied, 109 S.Ct. 3155 (1989), *De Nobel v. Vitro Corp.,* 885 F.2d 1180, 1192-95 (4th Cir. 1989), *American Stores Co. v. American Stores Co. Retirement Plan,* 928 F.2d 986, 994 (10th Cir. 1991). Further, the PBGC's longstanding position has been that unaccrued benefits are not included in any of the priority categories that encompass the liabilities of a plan. *See,* PBGC Brief in Support of Mead's Petition for Rehearing and Suggestion for Rehearing En Banc, App. 186a-187a, 29 CFR §§ 2618.2, 2618.16 and 2618.30.

already earned or to "accrued benefits" under ERISA (App. 14a). More significantly, the court below ignored the following facts: (1) at the time of plan termination, both the IRS and PBGC reviewed and approved the Mead Plan proposed termination distributions,[13] and (2) the IRS and PBGC specifically told the court that unearned early retirement subsidies are not payable under ERISA or the Code as "liabilities" of a terminating the plan.[14]

The reason behind the court's strained conclusion is perhaps revealed in its statement that "[b]ecause Mead's termination of the Plan was what prevented the pensioners from satisfying the conditions[15] so that unreduced early retirement benefits could vest, the terms of the Plan allow the surplus funds to revert to Mead only after the unreduced early retirement benefits are satisfied." (App. 15a). This reasoning is wrong. Moreover, the Court of Appeals for the Third Circuit reached precisely the opposite result in a case on all fours with this case. *Nobers v. Crucible, Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (App. 161a, 163a). Finally, the "benefit expectations" theory underlying the conclusion has been rejected by the Eleventh, Fifth and Third Circuits. *See, Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc), *May v. Houston Post Pension Plan*, 898 F.2d 1068, 1070 (5th Cir. 1990), *Ashenbaugh*, 854 F.2d at 1529.

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[13]Mead's Plan administrator, using typical fiduciary prudence, sought and received an IRS determination letter (App. 159a) and PBGC Notice of Sufficiency (App. 156a) upon the plan's termination.

[14]*See*, Dept. of Justice letter to U.S. Court of Appeals for the Fourth Circuit (App. 167a), and Brief of PBGC (quoted in Mead's Petition for Certiorari at p. 8).

[15]It should be noted that whether any employee will ever satisfy plan criteria for a benefit cannot be known until it actually occurs. An original plaintiff to this action, David H. Wall, died after the plan termination apparently before reaching age 62. (App. 3a).

VI. THE FOURTH CIRCUIT'S DECISION CREATES INTOLERABLE UNCERTAINTY AS TO THE PROPER METHOD OF CALCULATING BENEFITS FOR PLAN TERMINATIONS

The Fourth Circuit majority's misunderstanding of the law and disregard for the rules promulgated by the agencies responsible for administering ERISA is extremely troubling. The court below was not dealing with an obscure or new IRS regulation or with unusual plan provisions. Indeed, IRS regulation § 1.401-2(b)(2) requires every pension trust to "contain a definite affirmative provision to th[e] effect" that "[i]t must be impossible for the employer to recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." (App. 74a). The regulation does not require that its exact wording be copied into a plan; rather, it merely requires a statement to the same "effect" as the regulation. Thus, plans do not contain identical phrases. As we have stated at the outset, however, the provisions in the Mead Plan are like those found in thousands of other plans.

The majority's comment below that "[w]hether ERISA would compel payment of the benefits in absence of such language in the plan is a question that is unnecessary to answer" is absurd. "Such language", as even the court below recognized, is present *because* of ERISA and the Code.[16] Not just Mead's Plan, but every tax qualified plan must contain provisions to describe the regulation.[17] On a daily basis, plan

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[16]According to th majority, "[t]he terms of the plan were written in light of the regulation". (App 14a).

[17]The Mead Plan contains many provisions aimed at maintaining its qualification. *See* the provisions of the Mead Plan described in Mead's Petition at pp. 13-14. Indeed, the Plan expressly deems null and void *any* provision which is "unenforceable or in conflict with any of the provisions of Section 401 of the Internal Revenue Code." Art. XV, § 4. (App. 125a).

fiduciaries interpret their plan provisions in a manner consistent with this IRS regulation and the rulings which explain it. As this Court recognized in *Firestone Tire & Rubber Co. v. Bruch*, when the fiduciaries administering a plan have discretion to interpret plan terms, fiduciary decisions about payment of benefits should not be second guessed by a court unless they represent a clear "abuse of discretion." 489 U.S. 101, 115 (1989).[18]

A holding contrary to accepted practice, unsupported by any analysis of the views of the agencies responsible for enforcing ERISA, is dangerous and will operate as an invitation to reopen thousands of plan terminations under which assets were thought to have been distributed correctly. The decision below casts doubt not only upon the propriety of every reversion, but also upon the correctness of the amount of benefits paid, under every terminated plan that contained early retirement benefits.

The decision below also makes it impossible to know how to terminate plans attempting to comply with the Retirement Equity Act of 1984 ("REA"). For plan terminations occurring after July 30, 1984, REA requires that the plan must make provision to pay unreduced early retirement benefits to participants who — *after* plan termination — satisfy the criteria for the benefit through continued service with the plan sponsor. If the criteria are later satisfied, the subsidized benefit under REA is calculated with reference only to the participant's pre-termination service. IRC §411(d)(6)(B), Rev. Rul. 85-6, 1985-1 C.B. 133.

REA was enacted to provide an additional benefit to those employees who eventually retire from the plan sponsor after

[18]The Mead Plan fiduciaries had discretion to interpret plan terms. Article XI, § 1(b)(ii). There was no abuse of discretion here since the Mead Plan fiduciaries' decision not to pay benefits was approved by the IRS and the PBGC. *See*, n. 13, *supra*.

plan termination and after meeting the age and service requirements for the plan's unreduced early retirement benefit. As our memberships have always understood, the protections enacted by REA augment a participant's accrued normal retirement benefit which becomes fully vested upon plan termination. The court below postulated that the enactment of REA was a mere "clarification" of the law (App. 11a), yet its holding is more expansive than REA since the court failed to recognize that REA requires early retirement benefits to be earned through continued service after the plan terminates. Indeed, the effect of the decision of the court below is to nullify REA — at least in the Fourth Circuit.

By refusing to recognize that REA worked a change in the law by expanding the liabilities that must be paid under terminating plans (*see*, Judge Chapman's dissent, App. 27a-29a), the majority's holding poses an intolerable dilemma for the actuarial profession: for plans terminating now, are unearned unreduced early retirement benefits (1) payable immediately to employees who have not earned them because they constitute "contingent" liabilities, or (2) payable as REA provides — only if and when the participant later retires after having met the eligibility requirements for the benefit?

VII. CONCLUSION

For the foregoing reasons, the Academy and ASPA respectfully submit that Mead's Petition for Certiorari should be granted.

Respectfully submitted,

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(4)

No. 91-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner
v.
B. E. TILLEY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the Court below properly interpreted Article XIII, § 4(f) of the Mead Industrial Products Salaried Pension Plan, which, if the plan is terminated, mandated satisfaction of "benefit rights and contingent rights accrued under the plan," to require payment of earned early retirement benefits to four employees who met the plan's 30-year service requirement for such benefits but had not yet reached the plan's early retirement age (62) and to a fifth employee who had reached age 61 and had 28 years of service?

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents, five former employees of the Lynchburg Foundry Company, a subsidiary of The Mead Corporation ("Mead" or "Corporation"), brought suit in the United States District Court for the Western District of Virginia over seven years ago, claiming that Mead improperly took $11,000,000.00 in assets from the employees' trust without discharging the plan's liability for early retirement benefits that employees had accrued through their service for the Corporation but had not yet qualified for when Mead terminated the plan. Four employees had performed more than the 30 years' service required to qualify for the benefits but had not yet reached the plan's early retirement age (62). A fifth employee, who was age 61, had 28 years of service. On average, the difference between the value of the unreduced contingent early

retirement benefits that the plan failed to discharge and the plan's normal retirement benefits was $9,000.00.[1]

The employees lost in the District Court and won in the Court of Appeals for the Fourth Circuit. On *certiorari*, this Court reversed and remanded the case back to the Court of Appeals which again ruled in the employees' favor, but on a narrow plan interpretation ground. Mead now seeks to bring this case to this Court once again.

The employees contended on brief and in oral argument in the Court below (as Justice Stevens had suggested in his dissent from this Court's decision to remand rather than decide this case) that the peculiar language in Mead's plan obligated the plan to satisfy contingent early retirement benefits because Mead could only withdraw assets from the employees' trust "after the satisfaction of benefit rights or contingent rights accrued under the plan."[2] Article XIII, § 4(f).

The Circuit Court found it "unnecessary to resolve the apparent conflict between current practice [of the IRS with respect to early retirement benefits generally] and legislative and regulatory history" and concluded that early retirement benefits earned by employees based on their years of service were "'contingent rights' because the plan was liable to pay them on a contingency, i.e., the plaintiffs' satisfaction of the age and service requirements." (App. 13a.) That Court observed that "requiring the employees to have satisfied the conditions for the benefit, making it vest, would make a nullity of the con-

[1] Mead will retain most of the $11,000,000.00 it took from the employees' trust, regardless of whether the lower Court's decision is left undisturbed.

[2] Contrary to petitioner's claim, the ground relied upon by the Court below was presented in respondents' brief below. *See* Brief of Appellant pages 38-39 (Fourth Circuit) (App. 6a) (early retirement benefits "Should Have Been Paid Upon Termination Pursuant To Article XIII, 4(F) Of The Plan").

cept of contingent rights, which are protected by the terms of the Plan." (App. 14a.)

Quoting Justice Stevens' opinion, the Court of Appeals further rejected Mead's contention that the employees' rights to benefits were "mere expectancies." (App. 15a.) The Court found that the participants had relied upon the plan provisions and that they had in fact earned the benefits through their service. (App. 15a.) Mead prevented the employees from reaching the early retirement age while the plan was in operation by unilaterally terminating the plan. The Court pointed out that ERISA required Mead to provide for these contingent rights by funding them as they were earned. (App. 15a.) *See* Justice Stevens' dissenting opinion. (App. 47a, & n.3.) The Court of Appeals further recognized one of ERISA's central policy goals to be protection of the interests of employees and to guard against the abrogation of retirement benefits for which employees have been working. (App. 15a, citing 29 U.S.C. § 1001 and *Shaw v. Delta Airlines*, 463 U.S. 84, 90 (1983)).

Alternatively, the Court below held that under Article XIII, § 4(f) of the plan, Mead could recover only the "surplus remaining in the fund, due to actuarial error." (App. 12a-13a.) The Court declined to interpret the term "'actuarial error,' as used in Article XIII of the Plan, so as . . . to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel." (App. 13a.) Mead therefore could not recover the contributions used to fund the plan's early retirement benefits because Mead decided to cancel them. That, the Court ruled, was not an "actuarial error" as defined in this particular plan.

Having rested its decision solely on plan language, the Court found it unnecessary to determine whether Mead's failure to pay or provide for early retirement benefits

also violated the terms of the Internal Revenue Code and of ERISA as they stood in 1983.[3]

SUMMARY OF ARGUMENT

The issues remaining in this litigation are of interest only to the parties. The Court of Appeals correctly decided this case on a narrow ground of plan interpretation, a factual determination that does not justify *certiorari*. *United States v. Johnson*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stephens, J.); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-227, n.2 (1975). The plan created "contingent rights" to retirement benefits which in fact do accrue under the plan, in the sense that the value of the benefit increases with each year that the employee serves the employer. Mead's attempt to cabin the plan language within the confines of the statute presents no more than a factual controversy, and the Court below, far from disregarding the views of the agencies, found support for its reading of the plan in an IRS regulation extant in its present form since 1943. The Circuit Court's alternative ground based upon the plan's restriction upon the withdrawal of funds to those remaining in the plan due to "actuarial error" was also reasonable in light of the specific language of the Mead plan.

Neither the IRS nor the PBGC, at the time Mead alleges they "approved" Mead's termination, reviewed Mead's decision not to pay or provide for early retirement benefits. PBGC merely found the plan's assets "sufficient" to pay PBGC *guaranteed* benefits, and early retirement benefits are not now and were not in 1983 guaranteed. The IRS merely advised Mead that the plan might lose its qualified status "if plan assets are returned to you [Mead] before the plan's liabilities to

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[3] Congress has substantially amended the relevant provisions of the Internal Revenue Code and ERISA since 1983, when this case arose. *See, infra*, pp. 18-20.

participants are satisfied. . . ." The Court did not disregard the agencies' views on the statutory questions; it rested its decision on the plan document.

The only statutory issue conceivably touching on the lower Court's decision does not warrant review because Congress amended ERISA and the Code effective July 31, 1984, after this suit was filed, to clarify the law protecting early retirement benefits. That change in the statutory landscape drains this case of whatever importance it might once have had since statutes of limitations bar suits in most states arising out of pre-REA terminations like this one. Were the Court to decide this case under old law, as it would be obliged to do, it could readily sow confusion as to the proper interpretation of REA itself. This Court does not ordinarily grant *certiorari* when a change in the legal landscape occurs, and this is not a case warranting an exception to that practice. Consideration of the intervening legislation, should it prove necessary, should await a case governed by that legislation.

None of the opinions Mead cites establishes a conflict among the circuits. One is unpublished, and thus has no precedental value, and all of them are distinguishable or reflect inapplicable, post-REA rulings.

Mead's arguments based on PBGC's "exposure" if this case is allowed to stand is based on a plain misreading of the Notice of Sufficiency which PBGC issued to the plan (and to others), and to which we alluded above. Our research, and that of the AARP, an amicus below, establishes that far from appearing in "virtually every plan," the particular language the lower Court construed is highly unusual, if not unique. The flood of cases Mead predicts is a chimera. In the nearly five years since the District Court first ruled in respondents' favor, litigation involving a terminating plan's failure to pay or provide for early retirement benefits under the pre-REA law has arisen, so far as we can determine, with respect to only

two other plans. Under all these circumstances, *certiorari* should be denied.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT CORRECTLY INTERPRETED THE LANGUAGE OF MEAD'S PLAN AND THAT DETERMINATION DOES NOT WARRANT FURTHER REVIEW.

A. The Lower Court Correctly Found That The Early Retirement Benefits In this Case Were "Contingent Rights" Under Plan Article XIII, Section 4(f).

The lower Court's decision correctly interpreted the peculiar text of the plan before it and thus does not warrant further review. Article XIII, § 4(f) of this plan provided for the payment of "contingent rights," and that provision is entitled to enforcement regardless of whether, as Mead contends, ERISA and the Internal Revenue Code would not have required the satisfaction of the particular contingent liabilities at issue here.[4]

Unlike many other plans that, quoting Internal Revenue Code § 401(a)(2), prohibit an employer from taking assets from an employees' trust "at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust," the Mead plan required the prior satisfaction of "benefit *rights* and *contingent rights* accrued under the plan." Article XIII, § 4(f) (emphasis supplied).[5] This language, which so far

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[4] Contrary to petitioner's assertion, the separability clause of the plan did not nullify any plan provisions that were "inconsistent with the Code or IRS regulations." Pet. p. 13. Instead, the clause dealt only with provisions that were "illegal, unenforceable, or in conflict with" the Code. This is hardly a rule of construction equating plan language with the minimum requirements of the statute.

[5] One significant distinction between the plan language and the statutory language is that the statute refers to *liabilities* of the

as we have been able to determine is unique,[6] required the payment of early retirement benefits respondents earned by long years of service.

Not only does the word "contingent" aptly describe the benefit right here, but the benefits were also "accrued under the plan" in the sense that the size of an employee's benefit increases with each year of service the employee renders to the employer.[7] *See also, Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1172 (11th Cir. 1988) (en banc) (explaining accrual concept). The lower Court's interpretation of a contingent right is, as the Court noted, consistent with a still ex-

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plan, thus focusing on the obligations the plan has under applicable law. The document here referred to the "*contingent rights*" to *benefits* that had "accrued under the plan," thus focusing on the participants and the benefits they had earned under the plan benefit formula but whose payment was *contingent* on satisfaction of future eligibility conditions. Given the great care and precision with which highly skilled professionals draft pension plans, the Court would have been amply justified in inferring that the draftsman would have used the statutory language had it been his/her intent solely to satisfy statutory requirements.

[6] *See, infra*, p. 22.

[7] The Court below described the plan's benefit structure:

> The Plan offered both normal retirement benefits and early retirement benefits. Normal retirement benefits, payable at age 65, were calculated with reference to a participant's earnings and years of service. Participants became eligible for early retirement benefits at age 55. Early benefits were calculated in the same manner as normal retirement benefits, but the amount payable was discounted by five percent for each year that the participant retired prior to the normal retirement age of 65. However, if a participant had 30 years or more of credited service, then he or she could retire at age 62 and still receive the normal retirement benefits payable at age 65 without any reduction.

(App. 3a.) There is no difference in the way that the early retirement benefits and normal retirement benefits accrue under the plan benefit formulas. In form and structure the benefits are identical; the only difference between them is the eligibility condition. *See*, App. 92a, 94a.

tant 1943 Treasury Regulation which explains that the distinction between employees who have, and those who have not, "satisfied all requirements for a monthly pension . . ." such as having completed ". . . the required period of service . . ." is that the plan's liability to the former group is "fixed" while the liability to the latter group is "contingent." 8 Fed. Reg. 9351-53 (1943), 26 C.F.R. § 19.165(a)(2)-1(b)(2), now Treas. Reg. § 1.401-2(b)(2). Both types of liabilities have to be satisfied on plan termination prior to the diversion of any remaining assets to the employer. *Id.* Treas. Reg. § 1.401-2(b)(2) (1980). (App. 13a-14a.)

Petitioner argues that the term "contingent rights accrued" in the plan document dictates that the "contingent rights" be interpreted as referring to the statutory accrued benefit under Internal Revenue Code § 411(a)(7), 26 U.S.C. § 411(a)(7), which, under ERISA, is the statutorily defined benefit in which employees must vest in accordance with a statutory timetable.[8] The Court below correctly noted that "[t]he Plan incorporates no such reference to § 414(a)(7)'s concept of 'accrued benefit,' nor does the Plan manifest an intent to effect such an incorporation."[9] (App. 14a.)

Indeed, the plan included a separate provision, Article XIII, § 4(h), which provides for vesting of *the* accrued benefit on plan termination, as required by § 411(d)(3) of the Internal Revenue Code, 29 U.S.C. § 411(d)(3).

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[8] *See*, Internal Revenue Code § 411(a)(2). The statutory definition of accrued benefit does not mean that other benefits do not "accrue," i.e., are earned pro rata. It means simply that the plan need not provide that other benefits must vest pursuant to the timetables in § 411(a)(2).

[9] IRS rulings and prudent actuarial practice required petitioner to accumulate funds necessary to pay early retirement benefits. *See infra*, p. 10. Such benefits were thus either "currently accruing retirement income" or "other benefit liabilities" under the plan. *See* Plan Article XII, § 2(b).

Article XIII, § 4(f)'s requirement that the plan satisfy "contingent rights" before paying a reversion would have been unnecessary if "contingent rights" had the same meaning as the term "benefits accrued" under § 4(h). The Court's interpretation of "contingent rights" avoids treating § 4(f) as superfluous and on that ground also is a reasonable construction of this plan.

Petitioner also urges that the plan's references to "contingent rights accrued under the plan" must be read in light of a 1953 revenue ruling providing that "contingent liabilities are the benefit credits accrued up to the time of termination of the trust for employees." (Pet. p. 21). Petitioner equates the phrase "benefit credits accrued" in the ruling with the ERISA § 411(a)(7) "accrued benefit," a statutory concept created by Congress 21 years after the IRS promulgated the ruling in order to flesh out ERISA's requirement that employees have some vested pension right after a stated number of years of service. H.R. Rep. No. 807, 93rd Cong. 2d Sess. 60 (1974), reprinted in II Legislative History of ERISA at 3115, 3180 (1976); Boren, Qualified Deferred Compensation Plan § 3:22-76. Petitioner's argument is impossibly anachronistic. Moreover, petitioner's quotation of the Revenue Ruling is misleadingly incomplete. The full sentence in the ruling states that "Contingent liabilities are the benefit credits accrued up to the time of termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." The Court's interpretation of the Mead plan, unlike Mead's, is thus in consonance with the ruling and with a consistent line of IRS' authority called into question for the first time in this case.

The Court below did not disregard this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), as petitioner argues. (Pet. p. 20, n.11.)

Mead tardily first argued on rehearing that the panel had failed to defer to Mead's "reasonable" interpretation of its plan. *Firestone* teaches that courts should apply an "arbitrary and capricious" standard of review to the interpretations of a fiduciary body expressly authorized to exercise discretion in interpreting a plan and not operating under a conflict of interest. However, the record in this case showed that the Administrative Committee, the body granted discretion to interpret the Mead plan (App. 110a-112a) had not ruled on respondents' claim. A single member, Mead's Director of Benefit Planning, acted for the plan. He lacked authority to exercise discretion under the plan, and, as a top-level Mead employee, was laboring under a conflict of interest since Mead would receive additional money in the termination if he ruled in its favor. Under the circumstances, the Court of Appeals was free to interpret the plan *de novo*, as *Firestone* held. *Firestone Tire & Rubber Co. v. Bruch*, 289 U.S. 101, 11 1(1989). *See also, Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) (Posner, J.) (when person interpreting plan has conflict of interest, no deference is accorded).

B. The Lower Court Correctly Held In The Alternative That Assets Remaining In the Plan Because It Did Not Pay Early Retirement Benefits Were Not Due To Actuarial Error.

The Circuit Court also correctly held, in the alternative, that since "[p]etitioner was required both by IRS rulings and by prudent actuarial practice to accumulate the funds necessary to pay early retirement benefits," Justice Stevens' dissenting opinion, App. 47a, *see, id.* n.3 citing authorities), those assets did not remain in the plan due to "actuarial error," which the plan made a condition upon Mead's taking assets held in trust for

its employees.[10] The Circuit Court did not hold, as Mead claims, that Mead could not recover assets left in the plan *after* the plan discharged its obligations for subsidized early retirement benefits. The portion of the surplus the Court held ". . . not due to 'actuarial error' " was the surplus ". . . which remained in the Plan only because the value of the unreduced early retirement benefits were not paid. . . ." (App. 12a.) The Court commented that the phrase "actuarial error seems to reference computational error resulting from inaccurate statistical assumptions." (App. 12a.) But that is not the Court's holding. Rather, the Court explained its holding as follows (App. 12a-13a):

> . . . [i]f "actuarial error" means the cause of whatever remains in the Plan when a class of benefits, reasonably expected by participants and funded all the time the Plan is in operation, is terminated, then the phrase contributes no meaning to the contractual provision and is utterly redundant. More importantly, used in such a way, the word "actuarial error," is rendered unnecessary. We interpret "actuarial error," as used in Article XIII of the Plan, so as not to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel.

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[10] The language concerning "actuarial error" in Article XIII, is not, as Mead suggests, universal. Plans intending to provide that any assets remaining after satisfaction of all benefit liabilities are to be deemed due to "actuarial error" have little trouble saying so. In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 878 F.2d 1164, 1170 (1988), for example, the plan provided that any assets remaining after satisfaction of plan liabilities "shall . . . be deemed to have become available as a result of actuarial error and shall be distributed to the employer in cash." Similarly, in *Lynch v. J. P. Stevens & Co., Inc.*, 758 F. Supp. 976, 983 (D. N.J. 1991), the plan provided that "any funds not required to satisfy all liabilities of the Plan for benefits because of erroneous actuarial computations *or otherwise* shall be returned to the employer." (Emphasis added.)

(App. 13a.) The Court's ruling does not prevent Mead from retaining most of the $11,000,000.00 it took when the plan terminated.

Petitioner contends that the phrase "actuarial error" must be interpreted in conformance with a 1983 "key" revenue ruling released long after the plan had been drafted. (Pet. p. 4.) That revenue ruling holds that assets remaining after a plan satisfies all fixed and contingent liabilities are due to actuarial error. The lower Court's alternative holding is therefore consistent with the revenue ruling, for petitioner recovered assets before all "fixed and contingent liabilities had been satisfied," Rev. Rul. 83-52, 1983-1 C.B. 87, and is, in all events reasonable.

II. THE IRS AND PBGC POSITIONS DO NOT ESTABLISH THAT THE COURT BELOW MISREAD THE PLAN.

The Court below did not improperly disregard the views of the IRS and PBGC.[11] When the plan terminated, neither agency "approved" petitioner's determination not to pay or provide the early retirement benefits respondents had earned by their service. Compare Pet. p. 18. Before and after 1983, PBGC did not routinely review the treatment on termination of benefits like respondents', as petitioner implies. (Pet. pp. 18, 26.) Rather, as the Notice of Sufficiency in the record plainly demonstrates, PBGC reviewed information supplied by the Plan Administrator to determine whether "the assets of this [terminating] . . . plan will be sufficient as of your

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[11] Contrary to petitioner, the Court below did not "acknowledge" a long-standing PBGC, IRS and actuarial association practice of not treating unreduced early retirement benefits as plan liabilities on termination. (Pet. p. 12.) The Court stated that petitioner argued that this was the case. (App. 10a.) It did not "acknowledge" that it was.

proposed distribution date to discharge when due all obligations of the plan with respect to *guaranteed benefits*." (App. 158a.) (Emphasis added.)[12] In 1983 (as now), PBGC guaranteed only benefits that were "nonforfeitable," i.e., "vested," on the date of termination because a participant had by then satisfied all the plan's requirements. *E.g., Gray-Grimes Tool Co. Pension Plan v. Gray-Grimes Tool Co.*, 546 F.Supp. 102 (D. Mich. 1982) (explaining and quoting the PBGC regulations then in effect). Here, the benefits in question were not guaranteed by PBGC. Hence, PBGC's 1983 cover letter which accompanied the Letter of Sufficiency merely authorized the Mead plan within 90 days to "complete the termination of the plan in accordance with . . . ERISA," and requested that Mead certify that the distribution had been in accordance with the statute. (App. 156a) The PBGC's 1983 letter assuredly did not approve Mead's treatment of respondents' early retirement benefits. (App. 158a.)

Likewise, the IRS' favorable determination letter did not "approve" petitioner's failure to pay or provide for respondents' early retirement benefits. Rather than "approving" Mead's decision to cancel earned early retirement benefits, the IRS informed Mead that, while termination would not disqualify the plan, the "plan's qualified status will be adversely affected if plan assets are returned to you before the plan's liabilities to all participants are satisfied by the purchase of guaranteed annuity contracts or the making of lump sum distributions." (App. 160a.) The IRS never ruled on what liabilities were created under the plan's language. Indeed, the application form completed by Mead to obtain a favorable determination letter did not even require Mead to indicate

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[12] When this plan terminated, guaranteed benefits included, subject to certain dollar limits, nonforfeitable benefits under plan provisions in effect at least 60 months. ERISA § 4022, 29 U.S.C. § 1322 (1983).

whether it had satisfied contingent benefits. (*See* Resp. App. 6a).[13]

Moreover, the IRS has not at any time in this ligitation disagreed with the lower Court's interpretation of the Mead plan in this case. Prior to that decision, the Service, by letter to the Court, addressed a broader statutory question, namely, whether "prior to the enactment of the Retirement Equity Act . . . early retirement benefits such as those provided in the Mead-sponsored pension plan, constituted 'liabilities' of the plan [under § 401(a)(2) of the Internal Revenue Code] before any excess assets could revert to the plan's sponsor." The letter goes on to state the Service's view that "such pre-REA early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code." (App. 168a.)[14]

The IRS' letter to the Court below thus addressed only an issue the lower Court declined to decide, the reach of Internal Revenue Code § 401(a)(2). Moreover, this IRS position was announced publicly for the first time in this case—51 years after § 401(a)(2) was enacted—and conflicts with evidence produced by the American Association of Retired Persons in the court below showing that the IRS had taken a contrary administrative position prior to this case.[15] Brief of Amicus Curiae American

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[13] *See*, IRS Form 5310 (Rev. Nov. 1982) (Resp. Br. App. 1a-4a). The form was in the record below. The application form has since been revised and now requires the applicant to indicate whether contingent early retirement benefits had been satisfied.

[14] The IRS letter to the Court states that its position that "early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code . . . is set forth in detail in a letter of January 16, 1986, from the Acting Assistant Commissioner . . . to the General Counsel of the PBGC . . . ." We have searched the January 16, 1986, letter in vain for any reference, let alone analysis, of section 401(a)(2)'s requirements.

[15] The only evidence of the IRS' prior position is the January 16, 1986, letter to the PBGC discussed in note 14, *supra*. The letter

Association of Retired Persons in Support of Appellants at 11, n.12. Given this kind of administrative vacillation, the court below would not have been obliged to give great deference to the IRS' position, *cf. North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), which, in all events, related to the reach of the statute, not to the instrument the Court properly read as written.

Similarly, PBGC did not initially address the plan interpretation question the lower Court decided. In its brief supporting petitioner's suggestion for rehearing en banc, PBGC simply asserted that since early retirement benefits were not liabilities under § 401(a)(2) of the Internal Revenue Code they could not have been a "contingent right" payable under Article XIII, § 4(f) of the plan before plan assets reverted to Mead.[16] PBGC did not

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appears to represent an inter-agency treaty to reconcile the differences between PBGC and the Service arising out of the Service's successful attempt to persuade the Court of Appeals in a pre-REA case, *Amato v. Western Union International, Inc.*, 773 F.2d 1404 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), that a subsidized early retirement benefit was an "accrued benefit" which Int. Rev. Code § 411(d)(6) forbade eliminating by an amendment. *See*, 773 F.2d 1404, 1412. The letter draws an untenable distinction. According to the letter, the same benefit is to be treated as an "accrued benefit" if a plan sponsor attempts to eliminate it by amendment, or if the plan is *partially* terminated, but not if the employer completely terminates the plan. Section 411(d)(3) of the Code expressly mandates that "accrued benefits" be paid, to the extent funded, upon termination or *partial termination*. Furthermore, termination of a pension plan *requires* amendment, as Congress recognized when it enacted REA. Compare H.R. Rep. No. 655, 98th Cong., 2d Sess., pt. 2, 42 (1984) (House version of REA) with Sen. Rep. No. 98-575, 98th Cong. 2d Sess. 31 (1984). Congress intended, and the Service has agreed, that REA applies to plan terminations, though the statute it enacted refers only to *amendments*. Sen. Rep. No. 98-575, *supra*.

[16] Congress has, in another context, "recognize[d] that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual and statutory rights of any affected parties. Rather, this determination must ultimately

explain why the plan could not confer rights greater than those afforded by law and its view mocks the fundamental concept that ERISA and the Internal Revenue Code create "minimum standards" for pension plans.[17] The Court below simply was not obliged to defer to views that the Internal Revenue Service never expressed before this litigation, nor views the PBGC asserted but never adequately explained.

III. POST-1983 AMENDMENTS TO ERISA HAVE DRAINED THE STATUTORY QUESTIONS MEAD SEEKS TO PRESENT OF THE SIGNIFICANCE THEY ARGUABLY HAD WHEN THIS LITIGATION BEGAN.

To make this case appear more important than it is, Mead invites the Court to treat the holding as an interpretation of the relevant statutes, as they stood in 1983, rather than as an interpretation of the text of the Mead plan. But even if the decision below were read implicitly to decide a statutory, rather than a plan interpretation question, the case would not warrant further review because after the Complaint was filed and while this litigation was pending, Congress enacted the Retirement Equity Act, P.L. No. 397, § 301(a)(2), 98 Stat. 1426, 1451, 98th Cong. 2d Sess. (1984) ("REA"). REA amended Internal Revenue Code § 411(d)(6)'s rule prohibiting the reduction of an "accrued benefit" to reach elimination or reduction of early retirement benefits and retirement-type

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rest with the appropriate adjudicative agency, government agency or Court, as the case may be . . . the Committee also believes that the PBGC should not, by its actions in processing a proposed termination, effectively decide a dispute and preclude other affected parties from obtaining the relief to which they may be entitled . . ." H.R. Rep. No. 241, 99th Cong. 1st Sess., Pt. 2, at 44-45 (1985).

[17] *See, e.g.*, Int. Rev. Code §§ 410, 411 (catch lines). *See also*, Brief of Amicus Curiae Pension Benefit Guaranty Corporation in Support of Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. at 187a.)

subsidies, the benefit involved here, REA's legislative history, which "clarified" the law, Sen. Rep. No. 98-575, 98th Cong. 2d Sess. at 27-28 and an IRS ruling interpreting the amended prohibition, Rev. Rul. 85-6, 1985-1 C.B. 133, make clear that the protection REA affords to early retirement benefits applies to plan terminations as well as to plan amendments. Consequently, in post-REA terminations, unlike this one, claims for early retirement benefits would be governed by REA. (App. 10a, n.3.)

REA's amendments to § 411(d)(6) are generally effective with respect to plan amendments and terminations occurring after July 30, 1984. Retirement Equity Act, P.L. 98-397, 98 Stat. 1429 § 302(d). Consequently, statutes of limitations on most pre-REA claims have now run in 41 states and the District of Columbia and will run in a 42nd state in 1992. (Resp. Br. App. 5a-7a.) Of the remaining states, only two, Ohio and Kentucky, have statutes that run more than ten years, and given the passage of time since REA's effective date, laches will be available to protect defendants harmed by the delay. *See*, generally, Dobbs, Handbook On The Law Of Remedies, 43-44 (1973) (laches operates even though statute of limitations has not run). Moreover, we have found only two other pre-REA plan terminations since the original Fourth Circuit opinion in which employees have challenged a plan's failure to satisfy early retirement benefits. Petitioner's prediction that the Fourth Circuit's decision, if left to stand, will flood the Court with litigation and overturn thousands of settled terminations is implausible.

The authors of two recently published treatises on ERISA agree that this case is unimportant in light of changes in the law. BNA's just published treatise, ABA Section of Labor and Employment Law, Employee Benefits Law p. 421, n.250 (1991), states that "The scope of this decision is limited because the law has changed to require payment of certain early retirement benefits and

to require satisfaction of all 'benefit liabilities' before a plan can be terminated as a standard termination and excess assets recovered." Another ERISA treatise, edited and written by prominent attorneys, actuaries and consultants, notes that this case "involved a 1983 termination before a number of changes in the law." Wald & Kenty, ERISA, A Comprehensive Guide, at 286 (1991).

This is obviously the wrong case in which to consider the proper construction of REA, and post-REA legislation enacted after the Mead plan terminated. Although REA does not apply, were this Court to decide this case, the lower Courts and the bar would closely scrutinize its opinion for hints as to the proper construction of REA, thus creating confusion and uncertainty. Far better to confront questions concerning the proper interpretation of the later statute in a case arising under it. It is familiar learning, of course, that this Court will not ordinarily grant *certiorari* to decide issues whose significance has been drained by subsequent legislation, as the questions in this case have been. *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954). Respondents, five retirees who brought this case over seven years ago, should not have to bear the burden of litigating issues that, should they arise at all, will arise in the context of a reshaped statutory landscape.

IV. THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

None of the cases petitioner cites conflicts with the decision below, let alone create ". . . an embarrassing conflict of opinion and authority between the circuit courts of appeal" that this Court requires to justify *certiorari*. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1950).

There is no such conflict with respect to the meaning of the phrase in a pension plan "contingent rights accrued under the plan." *Nobers v. Crucible Inc. 1975*

Salaried Retirement Plan is an unpublished opinion of the Third Circuit (App. 161a), where ". . . only published opinions have precedental value." Rules of the Third Circuit, IOP 5.6 *published in* U.S.C.A. 1991 Supp. In all events, the opinion interpreted the pre-REA statutory requirements of ERISA § 4044(d)(1)(A) and not the terms of a particular pension plan and thus creates no conflict. *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), is irrelevant. It rejected a participant's contention that the amount of his monthly retirement benefit from a terminating plan should have reflected future service. Respondents did not contend and the Court below did not hold that the amount of their early retirement benefits should be based upon *future* service accruals. Moreover, *May* is a post-REA case and did not involve early retirement benefits.

Nor is there a meaningful conflict among the circuits on the proper interpretation of "actuarial error" when used in a plan document. In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 648 F.2d 1164 (11th Cir. 1988) (en banc), the Court did not interpret a plan provision that limited reversion to any surplus existing "as a result of actuarial error" (Pet. p. 19) because the plan expressly defined that term. "Paragraph 11 of Article XI [of the plan], as amended, states that any assets remaining after the plan's liabilities are met 'shall . . . *be deemed* to have become available as a result of *actuarial error and shall be distributed to the Employer* in cash.'" *Id.* at 1170 (emphasis added). This contractual language says explicitly what Mead contends the very different language in its plan should have been interpreted to say. In that context, the Court found "the plan's reversionary provision mirrors the regulatory provision of § 401(a)(2)." 848 F.2d 1164, 1170. Furthermore, the Eleventh Circuit *distinguished* this case, noting that "Neither *Amato* nor *Tilley* awarded benefits based on an employee's expected future years of service," *id.* at 1173,

but rather based benefits on actual years of service. That distinction, of course, is sound.[18]

Petitioner also contends that *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984), a *per curiam* opinion that does not deal with cancellation of early retirement benefits on plan termination, creates a direct conflict. *Dyneer* held that the actuarial-error limitation restricts recoverable surplus to surplus assets remaining "when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from an insurance company with respect to individuals for whom the liabilities are determined." The Fourth Circuit held that the Mead plan, by failing to pay early retirement benefits, had not satisfied all liabilities. There is thus no conflict between this case and *Dyneer*.[19]

In all events, the lower court's interpretation of the phrase "actuarial error" is an alternative ground on

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[18] All those distinctions aside, *Blessitt* did not involve unreduced early retirement benefits which, of course, creates the controversy here. (App. 3a.)

[19] Mead also cites two District Court cases, affirmed without opinions, as having "approved constructions of 'actuarial error'" that conflict with the Fourth Circuit decision. (Pet. at 19-20.) One Court quoted a proposed plan provision containing the phrase but neither discussed its meaning nor considered the phrase in the context of a cancellation of early retirement benefits. *In Re C.D. Moyer, etc.*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3rd Cir. 1978). The other explained that the Treasury Regulation using the phrase is designed to assure that the employer provides "defined benefits" but does not validate participants' claims to "accidental overfunding." *Washington Baltimore Newspaper Guild Local No. 35 v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984). The Fourth Circuit here held that the overfunding was not "accidental" but was due to the cancellation of the plan's defined, early retirement benefits. No such cancellation occurred in the *Guild* case. The Appellate Court affirmances without opinion do not establish any conflict, let alone an "embarrassing conflict," among the circuits.

which the panel was sharply divided. In light of the procedural posture of this case, whether the Fourth Circuit will adhere to or distinguish that ground should future cases arise is an open question. "*Certiorari* is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1950). This is not such a case.

V. THIS CASE THREATENS NEITHER TO PROVOKE A FLOOD OF LITIGATION NOR TO ENDANGER THE SOLVENCY OF PBGC.

In an attempt to confer upon this case an importance it does not have, Mead has conjured up an imaginary parade of horribles that do not withstand analysis. To accomplish that objective, Mead has largely ignored the lower Court's reasonable interpretation of this plan's unique "benefit rights and contingent rights accrued under the plan" language, and given the Court's alternative ground, relating to the plan's "actuarial error" restriction, an unnecessarily broad reading. It has assumed, erroneously, that all plans that terminated between 1980 and 1989 provided subsidized early retirement benefits; and contained language that is indistinguishable from the Mead plans; and failed to pay those benefits. Mead further assumes that, unlike Mead's plan, all of those plans' surplus assets represented the effect of cancelling participants' earned early retirement benefits. Gilding the lily, Mead ignores the effects of statutes of limitation and the doctrine of laches and assumes that every affected ex-participant will become a plaintiff. On those bases, Mead predicts, the entire pension world is about to be washed away in a flood of litigation.

Apparently, Mead's assertion that the PBGC may face significant liability if the lower Court's decision is left undisturbed is based upon Mead's erroneous understanding of the scope of the "Notice of Sufficiency" PBGC routinely issued to Mead and to other plan administrators. *See*, p. 14, *supra*. As we have seen, PBGC insures only *guaranteed* benefits and the benefits at issue here are not and were not guaranteed. PBGC recognizes that litigation has drained this case of its significance. Since, on its own initiative, it supported Mead's first petition for *certiorari* here, PBGC has participated actively in every phase of this litigation. Yet, though it advised the lower Court that it disagreed with its ruling, PBGC has not joined Mead's attempt to have this Court review the controversy once again.[20] PBGC's silence now demonstrates the implausibility of Mead's assertion that the narrow holding below threatens to bankrupt PBGC and the pension system.

As we have already pointed out, another premise of Mead's jeremiad is that the language the lower Court parsed is found in all plans. It is not. We have searched a host of model plans and the American Association of Retired Persons has examined the pension plans of some of the nation's largest employers without finding a single document that uses the phrase "all benefit rights or contingent rights accrued under the Plan," which the court below construed here. See Brief *Amicus Curiae* Of American Association of Retired Persons In Opposition To Appellee's Petition For Rehearing And Suggestion For Rehearing *En Banc* at p. 9. Petitioner's *amici* state that "Mead's Plan and all others include *virtually* identical terms regarding the contingent liabilities that must be paid before reversion of surplus assets can occur." (Pet. p. 10.) Like beauty, "virtual identity" is "in the eye of the beholder," and "virtually" implies that in fact the language in other plans is different. Given the protection

[20] As the Court knows, PBGC has independent litigating authority.

REA afforded early retirement benefits beginning shortly after Mead's termination, Mead's speculation about the likely impact of the lower Court's narrowly written decision upon other plan terminations is dubious. Indeed, if Mead's prophecy of a flood of litigation were correct, one would expect to see far more than the handful of pre-REA cases brought in the nearly five years since the lower Court's first favorable decision.

In short, despite Mead's hyperbole, this case comes down to an insignificant disagreement between Mead and respondents over the meaning of particular phrases in the Mead instrument. The lower Court disagreed with Mead and held that, as drafted, this particular plan document gave participants termination rights somewhat broader than those which Mead contends the law in effect in 1983 required. We respectfully submit that the lower Court did not commit a violence to the pension system by interpreting the instrument before it against the draftsman and in favor of the employee and beneficiaries for whom Congress enacted the very statutory scheme which petitioner invokes. *Landro v. Glendenning Motors, Inc.*, 625 F.2d 1344 (8th Cir. 1980). This case, which has already dragged on for more than seven years, deserves closure. These five retirees should not be asked to bear the burden of litigating issues that, if at all significant for future cases, are governed by a new statute that does not apply to them. *Certiorari* should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Mead's petition.

Respectfully submitted,

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APPENDICES

SAMPLE IRS FORMS

Worksheet

Sample of Form 5310 Used for Application for Determination Upon Termination; Notice of Intent to Terminate, Including Instructions

Form **5310** (Rev. Nov. 1982)
Department of the Treasury Internal Revenue Service
Pension Benefit Guaranty Corporation

Application for Determination Upon Termination; Notice of Merger, Consolidation or Transfer of Plan Assets or Liabilities; Notice of Intent to Terminate

(Under sections 401(a) and 6058(b) of the Internal Revenue Code and section 4041(a) of the Employee Retirement Income Security Act of 1974)

OMB No. 1545-0182
Expires 5-31-85
For Agency Use Only

Complete every applicable part of this form. If an item in an applicable part does not apply, enter N/A. Multiemployer plans covered by PBGC insurance program, see Purpose on page 1 of the instructions.

Reason for filing (check applicable box(es); see General Instructions):

A ☐ Notice of plan—(i) Merger, (ii) Consolidation, or (iii) Transfer of plan assets or liabilities to another plan.

B ☐ Application for ONLY an Internal Revenue Service (IRS) determination letter regarding a plan termination. (This is NOT a notice of intent to terminate for the Pension Benefit Guaranty Corporation.)

C ☒ Defined benefit plan filing "ONE STOP" (One-Stop filing is a voluntary choice in lieu of separate filings under B and D for):
(i) Notice of intent to terminate under the Pension Benefit Guaranty Corporation (PBGC) termination insurance program AND
(ii) Application for an IRS determination letter upon plan termination.

D ☐ Defined benefit plan filing ONLY a notice of intent to terminate under the PBGC termination insurance program. (This is NOT a request for an IRS determination letter.)

Part I All Filers Complete This Part

1 (a) Name of plan sponsor (see instructions): Manufac Corporation
Address (number and street): 20425 Connecticut Avenue
City or town, State, and ZIP code: Washington, D.C. 20550

1 (b) Employer identification number: 60 | xxxxxxx
1 (c) Sponsor's telephone number: (202) 444-0000
1 (d) Employer's tax year ends: Month 12 Day 31 Year 19
1 (e) Business code number: 5600
1 (f) Date business incorporated or begun: 1/1/58

2 (a) Name of plan administrator (if same as 1(a), enter "same"): Pension Plan Committee
Address (number and street): Same as above
City or town, State, and ZIP code

2 (b) Administrator's employer identification number: 61 | xxxxxxx
2 (c) Administrator's telephone number: ( )Same as above

2 (d) Name, address, and telephone number of person to be contacted if more information is needed (see instructions):
Name Barry Barrister, Esquire Telephone number (202) 555-2121
Address 1000 Torts Boulevard, Washington, D.C. 20000

2 (e) Office of the District Director of the key district where sponsor is located (see instructions): Baltimore

3 If you checked reason for filing B, C, or D, has each party who is required to be notified been properly informed of this filing (see instructions)? . . . . . ☒ Yes ☐ No

4 Type of plan entity (check only one box; see instructions):
(a) ☒ Single-employer plan
(b) ☐ Plan of controlled group of corporations or trades or businesses under common control
(c) ☐ Multiple-employer-collectively-bargained plan (other than a multiemployer plan)
(d) ☐ Multiple-employer plan (other)
(e) ☐ Other (specify) ________

5 (a) Plan name: Manufac Corporation Pension Plan
(b) Plan number: 0|0|1
(c) Plan year ends: 12/31

6 (a) Is this a defined benefit plan covered under the Pension Benefit Guaranty Corporation termination insurance program (see Part IV instructions)? (i) ☒ Yes (ii) ☐ No (iii) ☐ Not determined

(b) If you checked "Yes" or "Not determined," have you ever used an employer identification number or plan number in any prior filing with PBGC other than the ones entered on lines 1(b) or 5(b) above? . . . . . ☐ Yes ☒ No
If "Yes," enter the number(s) previously reported. ▶

7 Indicate type of plan (see General Instruction D):
(a) ☐ Defined benefit
(i) ☐ Fixed benefit
(ii) ☒ Unit benefit
(iii) ☐ Flat benefit
(b) ☐ Money purchase
(c) ☐ Profit-sharing
(d) ☐ Other (specify) ▶

Under penalties of perjury, I declare that I have examined this application, including accompanying statements, and to the best of my knowledge and belief it is true, correct and complete.

Signature ▶ ________ Title ▶ ________ Date ▶ ________

Signature ▶ ________ Title ▶ ________ Date ▶ ________

For Paperwork Reduction Act Notice, see page 1 of the instructions.

…ontinued):

(c) Complete the following as of the proposed date of plan termination (current year) and as of the end of the 2 prior plan years:

	19..81. Yes	19..81. No	19..82.. Yes	19..82.. No	Current year 19..83.. Yes	Current year 19..83.. No
(i) Did the plan satisfy the percentage tests of Code section 410(b)(1)(A)?	X		X		X	
(ii) Total number of employees (if more than 100 enter "100 plus")	40					

Enter the number of participants employed for the current plan year and each of the 5 prior plan years on the schedule below:

	1978...	19..79.	19..80.	19..81..	19..82..	Current year 1983....
(i) Number at beginning of plan year	34	32	33	33	34	32
(ii) Number added during the plan year	1	2	2	4	3	3
(iii) Total (add lines (i) and (ii))	35	34	35	37	37	35
(iv) Number dropped during the plan year	-3	-1	-2	-3	-5	-1
(v) Number at end of plan year (subtract (iv) from (iii))	32	33	-33	34	32	34
(vi) Total number of participants in this plan separated from service during the plan year without full vesting	1	0	2	2	3	0

…mmary of Participant or Claimant by category:

	Total number	Amount of monthly benefits as of the most recent payment date
(a) Retirees and beneficiaries (including disability retirees) receiving benefits	100	$40,000
Active participants eligible for normal retirement	0	
Active participants eligible for early (but not normal) retirement	0	
(d) Active participants vested before termination (other than normal or early retirement)	24	
All other active participants	10	
Participants separated from service with deferred vested benefits	66	
(g) Total (add lines (a) through (f))	200	

Miscellaneous:

	Yes	No	Not Applicable
As a result of the termination, are accrued benefits or account balances nonforfeitable as required under Code section 411(d)(3)?	X		
(b) Will the trust continue to operate after termination of the plan (see Instructions)?		X	
Were any funds contributed in the form of, or invested in, obligations or property of the employer or any group of corporations or group of trades or businesses under common control?		X	
(d) Will distribution include property other than cash?	X		
(e) For a defined benefit or money purchase plan, do you estimate there will be an accumulated funding deficiency as of the end of the plan year during which the proposed termination date occurs, if no additional plan contributions are made?		X	
If "Yes," enter the estimated accumulated funding deficiency $			
(f) (i) If there are unallocated funds which can be reallocated to participants without exceeding the limitations of Code section 415, have these funds been reallocated?			X
(ii) If (i) is "Yes," did the plan originally contain a provision allowing this allocation?			
(iii) If (ii) is "No," was the plan amended to provide for this allocation?			
(g) Will any funds be, or have any funds been, returned to the employer? If uncertain check "Not Applicable."		X	
If "Yes," enter the estimated amount ▶ $			
Is this plan or trust currently under examination or is any issue relating to this plan or trust currently pending before the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation or any court?		X	
If "Yes," attach a statement naming the agency(s) and/or court and briefly describing the issues.			
Did any plan participant during the current plan year or in the 5 prior plan years receive a lump-sum distribution (see Instructions) or have an annuity contract purchased by the plan from an insurance company on his or her behalf?		X	
If "Yes," state the largest amount so distributed or applied to purchase an annuity contract $			
Is this a Keogh (H.R. 10) plan?		X	
If "Yes," is an owner-employee covered under the plan?			
If an owner-employee is covered under the plan, will distribution be made to him or her before he or she reaches age 59½?			X
Does the plan have ESOP/TRASOP features?		X	

18 Defined contribution plans (other than money purchase plans) such as profit-sharing, stock bonus, or other such plans where forfeitures are credited to individual account balances, enter the information for the current plan year and the 5 prior plan years on the following schedule:

N/A

	19......	19......	19......	19......	19......	Current year 19......
(a) Employer contributions						
(b) Forfeitures						

(c) Explain basis on which forfeitures were allocated

19 Indicate how distributions will be made on termination (check applicable box(es)):

(a) ☒ Lump-sum distribution
(b) ☒ Annuity contract —
(c) ☐ Periodic payments from trust
(d) ☐ Transfer of assets and liabilities to another plan
(e) ☐ Other (specify) ▶

20 Statement of net assets available to pay benefits as of the proposed date of plan termination. Read specific instruction 20, and if you checked Reason for Filing C or D, read specific instruction 25(c) before completing this item.

Assets	
(a) Cash and cash equivalents	$164,505.00
(b) Receivables—	
(i) Employer contributions	
(ii) Other	40,000.00
(c) Party-in-interest investments—	
(i) Loans to employer	
(ii) Employer securities	
(iii) Other	
(d) Other investments—	
(i) Government securities	
(ii) Pooled funds/mutual funds	150,000.00
(iii) Corporate (debt and equity instruments)	
(iv) Real estate and mortgages	155,000.00
(v) Other	
(e) Buildings and other depreciable property	
(f) Unallocated insurance contracts	
(g) Other assets	
(h) Total assets (add lines (a) through (g))	504,505.00
Liabilities and Net Assets	
(i) Accounts and notes payable—	
(i) Past due benefits	
(ii) Employer	
(iii) Other	
(j) Accrued expenses	
(k) Mortgages payable	
(l) Acquisition indebtedness	
(m) Other liabilities	
(n) Total liabilities (add lines (i) through (m))	
(o) Net assets available to pay benefits (subtract line (n) from line (h))	$504,505.00

Form 5310 (Rev. 11-8D) Page 5

Part IV **Complete This Part If You Checked Reason For Filing C or D and checked "Yes" on line 6(a).**
If you checked Reason for filing C or D and "Not determined" on line 6(a), completion of this part is optional. However, if you do not complete this part, you must file the plan document, any amendments to the plan document, and the IRS determination letter(s) for the plan as described for lines 22(b), (c) and (g). If PBGC later determines that the termination insurance program covers the plan, you must file the remainder of the information required by this Part (see Part IV instructions).

21 (a) Name(s) of labor organization(s) representing plan participants: None
Address (number and street)
City or town, State, and ZIP code
(b) Telephone number ( )
(c) Name of principal officer
(d) Title of principal officer

22 Indicate the applicability of items (a) through (i) by checking the appropriate column. Attach each item that is applicable (see instructions):	Applicable	Not applicable
(a) Power of attorney. File 2 copies if you are filing "one-stop" (see General Instruction H)	X	
(b) Copy of executed plan document	X	
(c) Copy of executed amendment(s) to the plan document	X	
(d) Copy of executed group annuity or group insurance contract(s)		X
(e) Copy of executed trust agreement(s)	X	
(f) Copy of executed collective bargaining agreement(s)		X
(g) Copy of IRS determination letter(s)	X	
(h) Copy of the most recent actuarial report	X	
(i) Copy of the most recent financial statement of plan assets	X	

23 Indicate the sufficiency of plan assets (see instructions):	Yes	No
(a) Are any participants entitled to receive benefits assigned to categories 1 through 4 under ERISA section 4044? If "Yes," complete (b); if "No," enter N/A in (b), (c), (d), and (e).	X	
(b) Do you estimate that plan assets (excluding any amount described in (d) below) are adequate to provide all the benefits assigned to categories 1 through 4 on the proposed date of plan termination? If "Yes," enter N/A in (c) and complete item (d); if "No," complete (c) and (d).		X
(c) Indicate the estimated amount by which the value of benefits in categories 1 through 4 exceeds the value of plan assets on the proposed date of plan termination ▶ $100,000		
(d) Is the employer making a commitment (in the form prescribed in the PBGC regulation on determination of plan sufficiency) before the proposed date of plan termination to pay, on or before the date assets are distributed, the amount needed to provide all benefits in categories 1 through 4? If "Yes," attach a signed copy of the commitment; if "No," complete (e). See attached	X	
(e) Has the plan sponsor paid or does the sponsor intend to pay employer liability as prescribed in the PBGC regulation on employer liability before PBGC's request for payment? Note: Interest on employer liability will accrue from the date of plan termination.	X	

24 Submit participant data schedules in the format shown in the instructions for the following groups of participants:
(a) Retired participants and beneficiaries receiving benefits from the plan: See attached
(b) Participants separated from service not yet receiving vested benefits from the plan; and
(c) All other participants with vested or non-vested accrued benefits.

25 Indicate the information you are filing with this notice by checking one of the following boxes (see instructions):
(a) ☒ I am filing a complete Form 5310 including required attachments.
(b) ☐ I am filing a complete Form 5310 except the information showing plan assets allocated to participants (see note below).
(c) ☐ I am filing a complete Form 5310 except plan asset information (line 20) and participant data schedules (line 24). I will file the information required by lines 20 and 24 within 90 days after the date of this filing. (See note below.) By not filing lines 20 and 24 with the form, I am agreeing to extend the 90-day period prescribed by ERISA section 4041(a) during which I will not make any distributions pursuant to the proposed termination of the plan.
(d) ☐ With this form I am filing a request for an extension of time to file the information required by line(s) ______ (other than the information required by lines 20 and 24). (See note below.) For more information about extensions see the instructions.

Note: If you checked reason for filing C and you are not sending all the information required in Parts I, III, IV, and either completed Form(s) 6088 or a second copy of the complete participant data schedules described in the line 24 instructions of Form 5310, the 270-day period prescribed by Code section 7476(b)(3) will not commence until you file the remaining required information.

APPENDIX B

APPLICABLE STATE STATUTES OF LIMITATIONS

Alabama:	Ala. Code § 6-2-33 (1990) (six years).
Alaska:	Alaska Stat. § 09.10.060 (1990) (six years).
Arizona:	Ariz. Rev. Stat. Ann. § 12-548 (1990) (six years).
Arkansas:	Ark. Stat. Ann. § 16-56-111(b) (Supp. 1991) (five years).
California:	Cal. Civ. Proc. Code § 337 (West 1982) (four years).
Colorado:	Colo. Rev. Stat. § 13-80-101 (1987) (three years).
Connecticut:	Conn. Gen. Stat. § 52-576 (1990) (six years).
Delaware:	Del. Code Ann. tit. 10, § 8111 (1974) (one year).
District of Columbia:	D.C. Code § 12-301 (1989) (three years).
Florida:	Fla. Stat. Ann. § 95.11(2) (West 1982) (five years).
Georgia:	Ga. Code Ann. § 9-3-24 (1991) (six years).
Hawaii:	Haw. Rev. Stat. § 657-1 (1989) (six years).
Idaho:	Idaho Code § 5-216 (1980) (five years).
Illinois:	Ill. Rev. Stat. ch. 110, para. 13-206 (1982) (ten years).
Indiana:	Ind. Code Ann. § 34-1-2-1(5) (Burns 1986) (two years).*
Iowa:	Iowa Code Ann. § 614.1(2) (West Supp. 1991) (ten years).

---

* *See Kemper v. Warren Petroleum Corporation Inc.*, 451 N.E.2d 1115 (Ind. App. 2d Dist. 1983)

Kansas:	Kan. Civ. Proc. Code Ann. § 60-511(1) (Vernon 1976) (five years).
Kentucky:	Ky. Rev. Stat. Ann. § 413.090 (Baldwin Supp. 1990) (fifteen years).
Louisiana:	La. Code Civ. Proc. Ann. art. 3499 (West Supp. 1991) (ten years).
Maine:	Me. Rev. Stat. Ann. tit. 14 § 752 (1990) (six years).
Maryland:	Md. Cts. & Jud. Proc. Code Ann. § 5-101 (Supp. 1991) (three years).
Massachusetts:	Mass. Ann. Laws ch. 260 § 2 (1991) (six years).
Michigan:	Mich. Stat. Ann. § 600.5807(8) (1990) (six years).
Minnesota:	Minn. Stat. § 541.05 (1990) (six years).
Mississippi:	Miss. Code Ann. § 15-1-49 (1990) (six years).
Missouri:	Mo. Ann. Stat. § 516.120(1) (Vernon 1949) (five years).
Montana:	Mont. Code Ann. § 27-2-202 (Supp. 1991) (eight years).
Nebraska:	Neb. Rev. Stat. § 25-205(1) (1989) (five years).
Nevada:	Nev. Rev. Stat. § 11.190 (1989) (six years).
New Hampshire:	N.H. Rev. Stat. Ann. § 508:4 (Supp. 1990) (six years).
New Jersey:	N.J. Rev. Stat. § 2A. 14-1 (1990) (six years).
New Mexico:	N.M. Stat. Ann. § 37-1-3 (1991) (six years).
New York:	N.Y. Civ. Prac. L & R § 213 (McKinney 1991) (six years).
North Carolina:	N.C. Gen. Stat. § 1-52 (1983) (three years).
North Dakota:	N.D. Cent. Code § 28-01-16 (1987) (six years).

Ohio:	Ohio Rev. Code Ann. § 2305.06 (Anderson 1990) (fifteen years).
Oklahoma:	Okla. Stat. Ann. tit. 12, § 95 (West 1988) (five years).
Oregon:	Or. Rev. Stat. § 12.080 (1990) (six years).
Pennsylvania:	Pa. Stat. Ann. tit. 42, § 5527 (Purdon Supp. 1991) (six years).
Rhode Island:	R.I. Gen. Laws § 9-1-13 (1956) (ten years).
South Carolina:	S.C. Code Ann. § 15-3-530 (1991) (six years).
South Dakota:	S.D. Codified Laws Ann. § 15-2-13 (1991) (six years).
Tennessee:	Tenn. Code Ann. § 28-3-109 (1990) (six years).
Texas:	Tex. Civ. Prac. & Rem. Code Ann. § 16.051, Vernon 1985) (four years).
Utah:	Utah Code Ann. § 78-12-23 (1991) (six years).
Vermont:	Vt. Stat. Ann. tit. 12 § 511 (1990) (six years).
Virginia:	Va. Code Ann. § 8.01-246(2) (1950) (five years).
Washington:	Wash. Rev. Code § 4.16.040 (1990) (six years).
West Virginia:	W. Va. Code § 55-2-6 (1981) (ten years).
Wisconsin:	Wis. Stat. § 893.43 (1979) (six years).
Wyoming:	Wyo. Stat. § 1-3-105 (1977) (ten years).

(5)

No. 91-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,
v.

B.E. TILLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY MEMORANDUM FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE
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OCTOBER TERM, 1991

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THE MEAD CORPORATION,
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---

REPLY MEMORANDUM FOR PETITIONER

ARGUMENT

In its petition for certiorari, The Mead Corporation ("Mead") demonstrated that the decision below creates a direct conflict over the proper construction of crucial pension law provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") and that are incorporated into virtually every pension plan nationwide. In response to that showing, respondents informed the Court that the "technical" nature of the issues involved required them to "retain specialists in ERISA." *See* Application for Extension of Time to File Brief in Opposition to Petition for Writ of Certiorari at 1 (reprinted at App. 1a). Accordingly, respondents sought and received an extension of time to file their brief in opposition. In that opposition, respondents promise to demonstrate that this case is un-

worthy of certiorari. The opposition, however, misrepresents the law and the views of the responsible administrative agencies. Moreover, far from demonstrating that this case has only narrow significance, the bulk of the opposition is devoted to the counter-arguments of respondents' ERISA "specialists" on the merits of the important statutory construction issues presented by this case. These arguments serve only to highlight, in microcosm, the serious conflicts created by the decision below, which is at odds with the position of the responsible administrative agencies, other courts of appeals, and the pension community as a whole.

I. THE DECISION BELOW DOES NOT REST ON LANGUAGE PECULIAR TO THE MEAD PLAN

Respondents claim that this case rests on the "peculiar text of the [Mead] plan . . . and thus does not warrant further review." Opp. 6. But respondents ultimately defeat their own attempt to characterize the decision below as avoiding the statutory issues that were remanded by this Court. Like the court below, respondents construe, as they must, the two relevant plan provisions—"contingent rights accrued" and "actuarial error"—by direct reference to ERISA and the Code.

Respondents initially attempt to demonstrate that the Mead Plan's reference to "contingent rights accrued" is unique by misleadingly contrasting the Plan only with Code § 401(a)(2)'s general reference to plan "liabilities." Opp. 6-7. This approach completely ignores the IRS regulations and revenue ruling that define and explain "liabilities" for purposes of § 401(a)(2). As the petition points out (Pet. 14-15), for almost forty years the IRS has specified that § 401(a)(2) liabilities include "contingent liabilities," which consist of "benefit credits accrued up to the time of termination." Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274; *accord, e.g.*, Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69. Thus, the Mead Plan's reference to "contingent rights accrued"

is nothing more than an incorporation of the IRS' long-standing definition of "liabilities" in its regulations and revenue rulings.

Indeed, even respondents recognize that the Mead Plan cannot be read without reference to ERISA and the Code. Immediately after asserting that the Mead Plan's language is "unique" and is not derived from ERISA or the Code, respondents proceed to construe that language by reference to IRS regulations and revenue rulings. Specifically, respondents argue that the "lower Court's interpretation of a contingent right is . . . consistent with a still extant 1943 Treasury Regulation," and "in consonance with . . . a consistent line of IRS authority." Opp. 7-9 (citing Treas. Reg. § 1.401-2(b)(2); Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274).

Respondents take a similar tack with the second pension law provision at issue—"actuarial error." Here, significantly, respondents do not even attempt to argue that the actuarial error provision is "peculiar" to the Mead Plan. *See* Opp. 10-12. Instead, as they did with the "contingent rights" provision, respondents proceed directly to argue that the construction adopted by the decision below is consistent with IRS regulations. Opp. 12 (quoting Rev. Rul. 83-52, 1983-1 C.B. 87).

Thus, with both issues, respondents ultimately do not demonstrate that the Plan language is anything other than a direct incorporation of provisions from ERISA and the Code. Instead, respondents simply argue for their interpretations of the relevant statutes, regulations, and revenue rulings. Those interpretive issues, of course, are the questions which the court below decided and which demand further review by this Court. Respondents' arguments, in short, serve only to belie their facile contention that the decision below rests solely on the language of the Mead Plan. As even the court below candidly recognized, the Plan language was "written in light of" IRS regulations and revenue rulings. App. 14a. Thus, respondents'

claim that this case rests on "peculiar" plan language simply collapses of its own weight—and, in all events, conflicts with the contrary understandings of the pension world held by the PBGC and the two professional associations of pension plan actuaries, all of which support Mead in this case. Indeed, a cynic might conclude that the court below purported to dress up its decision in the language of the pension plan precisely so that respondents could argue, as they have, that this case does not warrant this Court's review, even though it plainly does.

II. THE DECISION BELOW CONFLICTS WITH THE VIEWS OF THE RESPONSIBLE ADMINISTRATIVE AGENCIES

Respondents also claim (Opp. 12-16) that the decision below does not disregard the views of the IRS and the PBGC, but that position simply cannot be squared with the filings by both agencies in the court of appeals. The IRS submitted a letter to the court of appeals that confirmed "the position of the Internal Revenue Service" that the unearned early retirement benefits at issue here were not "liabilities" that had to be paid on plan termination. App. 167a-168a. The PBGC agreed, filing a brief stating unequivocally that "[u]nearned subsidized early retirement benefits are not among the liabilities . . . that must be paid before residual assets revert to the employer." PBGC Br. on Remand at 4. The decision below reached precisely the opposite result. Thus, it is no surprise that the PBGC was moved to file a brief supporting rehearing en banc, in which it expressly criticized the panel majority for "failing even to consider" the agency views, and for adopting a "construction of terms of art used in the [Mead] Plan [that] does violence to the established meaning of those terms under the Code and ERISA." PBGC Br. In Support of Rehearing at 5, 11 (reprinted at App. 185a, 189a).

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

Respondents attempt (Opp. 18-21) to dismiss the several conflicts in the circuits created by the decision below, but careful scrutiny reveals this attempt for what it is: a strained effort to elevate any possible difference in fact pattern into a legal distinction. Indeed, respondents' argument ultimately devolves into the remarkable suggestion that the dissent below was so strong that the Fourth Circuit itself likely will not adhere to the decision below in future cases. *See* Opp. 20-21.

With respect to the conflict on the meaning of "contingent liabilities," respondents first quibble with the status of the Third Circuit's decision in *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (reprinted at App. 161a-166a). But the unpublished nature of the opinion does not lessen the conflict. The *Nobers* Court, like the court below, was called upon to decide the precise meaning of the "contingent liabilities" provision incorporated in a pension plan. But unlike the court below, the Third Circuit in *Nobers* adopted the PBGC's view and held that unearned early retirement subsidies such as those at issue here were not "contingent liabilities." The conflict could hardly be more direct and it merits this Court's resolution.[1]

Respondents try to distinguish two other conflicting cases on "contingent liabilities," *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), and *Blessitt v. Retirement Fund for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (en banc), by pointing out that neither involved early

---

[1] This Court has treated all circuit conflicts as significant enough to potentially merit review, regardless of whether the conflicting decisions are published or not, and has frequently granted certiorari to review conflicts with unpublished decisions. *See, e.g., Doe v. United States*, 487 U.S. 201, 205-06 (1988); *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 460 (1987).

retirement benefits. *See* Opp. 19-20 & n.18. This is true as a factual matter, but it provides no basis to ignore the legal holdings reached in these two decisions—holdings that directly conflict with the statutory analysis adopted below. The Fourth Circuit held in this case that "contingent liabilities" include any benefit that "the Plan was liable to pay . . . on a contingency—*i.e.*, the [respondents'] satisfaction of the age and service requirements." App. 13a. This approach contradicts both the *May* and *Blessitt* holdings. *May*, for instance, did not deal with unearned early retirement subsidies per se but rather with the broader question of all "unaccrued and unearned benefits." *See* 898 F.2d at 1070. The *May* court concluded that such unearned benefits—*i.e.*, "benefits that would accrue in the future if the employees continued to work for the employer"—were not "contingent liabilities" that had to be satisfied on plan termination prior to a reversion of surplus assets. *Id.* Thus, *May*'s broader holding plainly conflicts with the decision below, and that conflict is not eliminated simply because the Fifth Circuit's reasoning is not limited to early retirement benefits. Similarly, the *Blessitt* court, dealing with any benefits that had not yet been earned under a pension plan, held that "unaccrued benefit expectancies" are not "contingent liabilities." *See* 848 F.2d at 1170.

With respect to the conflict on the meaning of "actuarial error," respondents' attempt (App. 19a-21a) to disguise the conflict is even more untenable. First, respondents claim that the Eleventh Circuit's decision in *Blessitt* to adopt the IRS definition of "actuarial error" is distinguishable because the plan in *Blessitt* more completely parroted the language of the relevant IRS regulation. *See* Opp. 19. Again, respondents have missed the point. *Blessitt* held that the plan's reference to "actuarial error" should be construed to be consistent with the IRS definition of this term, while the decision below, as Judge Chapman pointed out in dissent, "deliberately ignor[ed]

the term's obvious origins in Treas. Reg. § 1.401-2(b)." App. 30a. The conflict could not be more direct.

Respondents also disingenuously attempt to enlist the *Blessitt* court itself in their effort to erase the conflict, suggesting that "the Eleventh Circuit *distinguished* this case." Opp. 19 (emphasis in original). But respondents neglect to mention that the Eleventh Circuit tried to distinguish the initial *Tilley* decision, not the decision now under review. Indeed, respondents fail to note that this Court has already rejected any attempt to distinguish *Blessitt*; in fact, this Court cited the conflict between *Blessitt* and the Fourth Circuit's initial decision in this case as the reason for granting certiorari. *See* App. 38a & n.8.

Respondents' attempt (Opp. 20) to distinguish the other conflicting court of appeals decision on "actuarial error"—*International Union, UAW v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984)—is similarly unavailing. Respondents do not, and cannot, dispute that this decision adopted the IRS definition of actuarial error, while the decision below "deliberately ignor[ed]" that definition. App. 30a; *see also Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.D.C. 1983) (adopting IRS definition), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984). Indeed, even respondents are not persuaded that they can distinguish the conflicting cases on actuarial error; they make the incredible argument that there is no conflict because the Fourth Circuit *itself*, in light of the "sharply divided" panel, will decline to adhere to the decision below in the future. *See* Opp. 20-21. Far from eliminating any conflict, respondents thus demonstrate the depth of the error in the decision below.

IV. THE DECISION BELOW CREATES WIDESPREAD UNCERTAINTY

Finally, respondents seek to downplay the significance of this case, claiming that it is "of interest only to the

parties." Opp. 4, 21-23. Respondents overlook, however, the notable fact that, as discussed above, both of the agencies charged by Congress with administering ERISA participated in this case before the court of appeals. The PBGC participated not only in the briefing and oral argument before the panel on remand, but took the unusual step of filing an amicus brief in support of rehearing.[2] Moreover, as the PBGC pointed out in its brief below, it has significant reasons for supporting Mead's position. The PBGC warned that a decision—like the one ultimately reached by the court of appeals—allowing respondents to recover unearned early retirement benefits:

> would create significant uncertainty regarding the distribution of assets in thousands of closed and pending cases in which employers received or expected to receive reversions of residual assets . . . [and] would doubtless be relied upon by plan participants in other cases who might seek to reallocate

[2] Respondents highlight the fact that the PBGC did not take the even rarer step of filing an amicus brief in support of Mead's petition for certiorari, and draw the unwarranted inference that the PBGC no longer believes this case to be significant. *See* Opp. 22. The PBGC has filed five briefs in support of Mead in this case. Furthermore, its last brief called for rehearing en banc, thus making clear that the agency believes that this case meets the standards of Federal Rule of Appellate Procedure 35(a), which calls for en banc review only where necessary to "maintain uniformity" or in cases of "exceptional importance"—the same standards that obtain under Supreme Court Rule 10. There is absolutely no basis for respondents' speculation that the PBGC's position has changed; rather, the agency no doubt believed that its earlier filings adequately informed the Court and the parties of its position and interest, and that a further restatement of those views was unnecessary. If this Court has any doubt that the PBGC continues to believe that the decision below is both wrong and warrants further review, the appropriate step is to call for the views of the PBGC, which has independent litigating authority, prior to granting the petition.

> billions of dollars previously distributed to participants and to employers.

PBGC Br. on Remand at 4. Thus, contrary to respondents' suggestion (Opp. 21), Mead has not "conjured up an imaginary parade of horribles" to buttress the significance of this case; Mead has simply repeated for the Court the analysis offered below by the PBGC.

Moreover, in claiming that this case has "interest only to the parties" (Opp. 4, 21-23), respondents conveniently ignore a pending class action suit that seeks the same benefits claimed by respondents for all other participants in the Mead Plan, whether they had one year of credited service, or seven years, or twenty-seven years. *See Linkous v. Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987). This suit, which was filed by respondents' own counsel, presents in part the same issues presented here.[3]

Respondents also argue (Opp. 16-18) that the passage of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), has "drained" all significance from the legal issues presented in the petition. Respondents are wrong. REA did not amend Code § 401(a)(2), which is the source of the legal issues presented in the petition; the "contingent liabilities" and "actuarial error" provisions at issue remain intact, and the erroneous constructions of those terms below remain problematic.[4] Indeed, far from REA draining this case of significance, it

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[3] Thus, it is disingenuous for respondents to argue, as they do repeatedly (Opp. 2 n.1, 12), that Mead will recoup the balance of the $11 million surplus after respondents receive their benefits. As respondents' counsel well knows, some or all of that $11 million may go not to Mead but to the *Linkous* class if the errors of the decision below are not corrected.

[4] For this reason, respondents' effort (Opp. 17) to point to a catalog of purportedly applicable state statutes of limitations is meaningless. Because the underlying provisions of ERISA and the Code have not been altered by REA or any other statute, their misconstruction by the court below will continue indefinitely to give rise to legal challenges to pension plan terminations.

is this case that threatens to drain REA of its importance. In REA, Congress required terminating pension plans to pay pension benefits to employees who, after termination, satisfy the plan's conditions for receiving those benefits by continuing service with the plan sponsor. *See* App. 27a-29a (Chapman, J., dissenting). The decision below, however, requires benefits to be paid to at least some participants who have not, and cannot, satisfy the age, service, or other conditions specified in the pension plan. App. 3a-4a, 12a; *see also* AAA/ASPA Br. at 16-17. Thus, at least in the Fourth Circuit, REA has been rendered a virtual nullity. Such a direct conflict with a congressional enactment warrants review by this Court.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner The Mead Corporation

November 7, 1991

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

No. ———

THE MEAD CORPORATION,
Petitioner

v.

B. E. TILLEY, *et al.*,
Respondents

APPLICATION FOR EXTENSION OF
TIME TO FILE BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

COME NOW the respondents, B. E. Tilley, et al, by counsel, and represent unto this court as follows:

(1) A timely-filed Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was received by respondents on September 5, 1991.

(2) The issues involved in this Petition are extremely technical in nature and have required respondents to engage the services of attorneys in Indiana and Washington, D.C. to assist in responding to said Petition.

(3) Counsel of record for respondents maintains a general practice in the City of Radford, Virginia. Without the ability to retain specialists in ERISA, respondents would be at a disadvantage and unable to fully respond to said Petition for Writ of Certiorari.

(4) An extension is necessary in order to have time to coordinate the efforts of all attorneys and to give counsel of record time to review, revise and print the material which will be received from retained counsel.

WHEREFORE, respondents, B. E. Tilley, et al, pray that this court grant a thirty (30) day extension of time to reply to the Petition for Writ of Certiorari.

Respectfully submitted,

B. E. TILLEY, *et al.*,

By: Clifford L. Harrison
Of Counsel

Clifford L. Harrison
Stone, Hamrick, Harrison & Turk, P.C.
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(703) 639-9056

Counsel for Respondents

6

No. 91-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner
v.
B. E. TILLEY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO BRIEF OF AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-356

THE MEAD CORPORATION,
Petitioner

v.

B. E. TILLEY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL MEMORANDUM IN RESPONSE TO BRIEF OF AMICI CURIAE

INTRODUCTION

This supplemental brief responds to the Brief Amici Curiae of two actuarial groups, which was filed on November 1, and which Respondents did not receive until after they had filed their opposition to certiorari.[1]

ARGUMENT

1. Amici's attorneys argue that the provisions governing reversion of assets to the employer in the Mead plan ". . . are like those in thousands of other plans." We disagree, of course. The Court may ascertain for itself the

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[1] See Brief of Amici Curiae American Academy of Actuaries and American Society of Pension Actuaries in Support of Petitioner ("Actuarial Groups Brief").

language that careful draftsmen use when they intend to limit the benefits payable on plan termination to those required under the statute. We have provided language from specimen plans published in several leading, widely available, reference works which demonstrate that the Amici's sweeping assertions are unworthy of belief. (See Appendix to this Memorandum.) As we pointed out before, and as these examples from oft consulted authorities suggest, the Mead plan's formulation, "benefit rights and contingent rights accrued under the plan" is hardly universal. So far as we have been able to determine it is unique.[2] Furthermore, the rule that Amici argue for—that the language in particular plans must not be construed as providing benefits in excess of statutory minima—might streamline plan terminations for actuaries, but the rule is fundamentally inconsistent with this Court's teaching that benefits in a pension plan are "contractually defined."[3] *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 (1985).

2. The Amici's claim that actuaries will not be able to process terminations of pension plans if the decision below is allowed to stand is advocate's hyperbole. If Amici were correct that the decision below has sown widespread confusion, the Internal Revenue Service would have provided guidance, as it did in response to *Blessitt v. Retire-*

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[2] None of the specimen plans refer to the concept of "contingent rights." Nor do they use the phrase "actuarial error," which Amici's attorneys argue is ubiquitous. Moreover, the opinion in *Nobers v. Crucible, Inc.* (App. 161a), nowhere refers to "contingent liabilities," let alone "contingent rights accrued . . . ," and is not, as the Amici assert, ". . . on all four. . . ." with the decision below. (Br. of Amici, p. 14.)

[3] In urging that the lower court correctly decided this case in favor of respondents we have necessarily confined ourselves to the reasoning of that court. That does not mean that there are not other grounds for sustaining its decision. See Mr. Justice Stephens' dissenting opinion (App. 45a-47a.)

ment Plan for Employees of Dixie Engine Co., 817 F.2d 1528 (11th Cir. 1987), *vacated*, 836 F.2d 1571 (1988), even before the Eleventh Circuit agreed to rehear the case en banc. *See* General Counsel Memorandum 39665 (Sept. 25, 1987). The Service has not responded in like fashion to the decision below, again suggesting that, despite the actuaries' doomsday prophecies, the decision below has not engendered widespread uncertainty.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for the writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Reversion Provision from Model Defined Benefit Plan in Sollee & Shapiro, Pension Plans—Qualification (BNA Tax Management Portfolio, Folio 351), at B-132:

> 14.02 Contributions. The plan assets will never inure to the benefit of the employer and will be held by the trustees solely in the interests of, and for the exclusive purpose of, providing benefits to participants and their beneficiaries and defraying expenses of administering the plan, subject, however, to the following: (a) return of mistake of fact contributions pursuant to section 13.05 above, (b) return of contributions predicated on the Plan's initial qualification, and (c) return of excess plan assets upon plan termination to the extent permitted by ERISA.
>
> 14.03 Prohibited diversion. No distributions from the trust will be made which are prohibited by the provisions of this plan. At no time will it be possible for any part of the Trust's assets to be used for, or revert back to, the employer or to be diverted to purposes other than the exclusive benefit of participants and their beneficiaries, other than mistake-of-fact contributions described in section 13.05, contributions conditioned on the plan's initial qualification as described in section 13.05, and any reversion of excess assets permitted by ERISA upon plan termination.

Reversion Provision from Sample Defined Benefit Plan language in Prentice Hall Pension Plan Forms, at p. 1372-73:

> XXI, C. Nonreversion
>
> 1. Except as provided in this subparagraph 1, the assets of the Plan shall never inure to the benefit of an Employer; such assets shall be held for the exclusive purpose of providing benefits to Members and their Beneficiaries and for defraying the reasonable administrative expenses of the Plan.
>
> * * * *

(e) In the case of the termination of the Plan, any residual assets of the Plan shall be distributed to the Employer at the direction of the Administrator (or at the direction of a trustee appointed upon the application of the Pension Benefit Guaranty Corporation) if all liabilities of the Plan to Members and their Beneficiaries have been satisfied and the distribution does not contravene any provision of law.

Reversion Provision from Model Plan in Canan & Baker, Qualified Retirement Plans (1987 Ed.), at p. 820-821:

12.01 Exclusive Benefit of Participants. Except under the circumstances set forth in Sections [12.10, 12.11 and 12.12] of this Plan, at no time shall any part of the Trust revert to the Employer or be used or diverted to any purpose other than for the exclusive benefit of the Participants or their Beneficiaries or estates. However, notwithstanding the preceding sentence, if, after the termination or partial termination of the Plan by formal action of the Employer or for any other reason, the Accrued Benefit of all Participants and all the Plan liabilities have been paid, then, consistent with Section 4044 of ERISA, any residual assets of the Plan shall revert to the Employer.

(7)

No. 91-356

In the Supreme Court of the United States

OCTOBER TERM, 1991

MEAD CORPORATION, PETITIONER

v.

B.E. TILLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly held that the terms of the pension plan terminated by petitioner in 1983 required payment of "unreduced" early retirement benefits to employees who had not fulfilled the conditions established by the plan for obtaining unreduced benefits, prior to the reversion of surplus plan assets to the employer.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.[1]

[1] The Department of the Treasury and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the distribution of the assets of a pension plan that has been terminated. The Treasury Department has a substantial interest in this case since the Internal Revenue Service makes determinations as to the tax-qualified status of pension plans and enforces applicable tax laws with respect to plans that fail to meet qualification requirements. Moreover, this case involves the interpretation of a regulation the Department has promulgated, 26 C.F.R. 1.401-2(b).

The PBGC, a wholly-owned government corporation that enjoys independent litigating authority, 29 U.S.C. 1302(b)(1),

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portions of Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1); Section 401(a) of the Internal Revenue Code, 26 U.S.C. 401(a); Section 301(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1450-1451; and the applicable Treasury Regulation, 26 C.F.R. 1.401-2(b), are set out in the appendix to this brief.

STATEMENT

1. Respondents were employees of the Lynchburg Foundry Company, formerly a wholly-owned subsidiary of petitioner, The Mead Corporation. Pet. App. 3a, 35a-36a. Each of the five respondents was a participant in the Mead Industrial Products Salaried Retirement Plan, which was established by Mead and funded entirely by contributions from Mead. *Id.* at 36a.

The Plan provided three types of retirement benefits: a normal retirement benefit, a reduced early retirement benefit, and an unreduced or subsidized early retirement benefit. Pet. App. 36a. The requirements for unreduced early retirement benefits are the subject of this litigation. Here, in brief, are the critical elements of the three types of benefits under the Plan: (1) The normal retirement benefit was payable at

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and therefore appears in this Court through its own counsel, is responsible for operating the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The PBGC has an interest in this case because it involves the interpretation of Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1), a key provision of Title IV. This brief reflects the views of the PBGC as well as of the Treasury Department.

age 65. It was calculated under a formula that took into account the participant's earnings and years of service. *Id.* at 36a, 93a-94a (Plan Art. V. § 1). (2) In contrast, the reduced early retirement benefit was available to participants who had attained age 55. That type of benefit was equal to the amount of the normal retirement benefit, reduced by five percent for each year that the participant was under age 65. Pet. App. 36a, 92a (Plan, Art. IV, § 2), 94a (Plan Art. V, § 2(a)). (3) Finally, the unreduced early retirement benefit was available to participants who had attained age 62 and had at least 30 years of service; it was equal in amount to the normal retirement benefit. Pet. App. 36a, 94a (Plan Art. V, § 2(b)).

The Internal Revenue Code provides that a pension trust may qualify for preferential tax treatment only "if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries," for the assets of the trust to be diverted to any other use. 26 U.S.C. 401(a)(2). Section 4044(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1344(d)(1), further provides that "any residual assets of a single-employer plan may be distributed to the employer if—(A) all liabilities of the plan to participants and their beneficiaries have been satisfied, * * * and (C) the plan provides for such a distribution in these circumstances." The applicable regulation provides that "[t]he term 'liabilities' * * * includes both fixed and contingent obligations to employees." 26 C.F.R. 1.401-2(b)(2). The regulation also provides that, upon satisfaction of a plan's liabilities, an employer may recover "any balance remaining in the trust which is due to erroneous actuarial computations," which are defined as "the surplus arising because actual requirements differ

from the expected requirements." 26 C.F.R. 1.401-2(b)(1). "Furthermore," the regulation states, "the trust instrument must contain a definite affirmative provision" to the effect that the employer is not permitted to recover assets from the plan except as provided by law. 26 C.F.R. 1.401-2(b)(2). Mead's Plan accordingly provided that in the event the Plan was terminated, "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan * * * shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead]." Pet. App. 11a, 37a, 122a (Art. XIII, § 4(f)).

In 1983, Mead sold the Foundry and terminated the Plan. Pet. App. 36a. At that time, respondents met the requirements for the reduced early retirement benefit. *Id.* at 37a. None of them, however, qualified for an unreduced benefit: four respondents had 30 years of service but were not 62 years old, while the fifth satisfied neither the age nor the service requirement. *Ibid.* Each respondent was paid a reduced benefit in a lump sum; thus, each received the present value of his normal retirement benefit reduced by five percent for each year that the participant was under age 65. *Id.* at 4a. The payments ranged between $50,000 and $87,000; if, however, respondents had been paid unreduced benefits, each would have received, on average, $9,000 more. Mead subsequently recouped $11 million from the Plan. *Ibid.*

2. In 1984, respondents filed suit in Virginia state court, contending that Mead violated ERISA by failing to pay them the unreduced early retirement benefit. Pet. App. 4a, 37a. Mead removed the case to the United States District Court for the Western District

of Virginia, which held that respondents were not entitled to the unreduced benefit. *Id.* at 4a, 37a-38a, 55a-60a. The Fourth Circuit reversed.[2] The court relied on Section 4044(a) of ERISA, 29 U.S.C. 1344(a), which states that, upon termination of a defined benefit pension plan, the plan administrator "shall allocate the assets of the plan" to six classifications and, if assets remain after the first five categories have been satisfied, pay "all other benefits under the plan." 29 U.S.C. 1344(a)(6); Pet. App. 4a, 38a, 48a-54a.

This Court reversed, holding that Section 4044(a) is solely an allocation provision and does not create benefit entitlements. Pet. App. 38a-44a. Because the Fourth Circuit had not reached two alternative grounds advanced by respondents, the Court remanded the case to the court of appeals. The Court directed the court of appeals to determine, first, whether unreduced early retirement benefits are "accrued benefits" that become "nonforfeitable" upon termination of a pension plan under 26 U.S.C. 411(d)(3); and, second, whether unreduced early retirement benefits are "liabilities" that must be satisfied, under Section 4044(d)(1)(A) of ERISA, 29 U.S.C. 1344(d)(1)(A), before the residual assets of a pension plan are recouped by the employer. Pet. App. 43a. The Court added that "the Court of Appeals should consider the views of the PBGC and the IRS." *Ibid.*

Justice Stevens dissented. Pet. App. 45a-47a. Although he agreed that Section 4044(a)(6) does not create an entitlement to retirement benefits, he con-

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[2] Shortly after the court of appeals issued that decision, a class action was filed on behalf of other participants in the Mead Plan seeking similar relief. That action is pending. See Pet. 7 n.4.

cluded that the Fourth Circuit had reached the correct result and that a remand was unnecessary. Pet. App. 45a. Justice Stevens pointed out that Section 4044(d) of ERISA provides that an employer may recoup the residual assets of a plan only after "all liabilities of the plan to participants and their beneficiaries have been satisfied." Pet. App. 45a. He noted that the Plan stated that Mead could recoup any surplus remaining "after the satisfaction of all benefit rights or contingent rights accrued under the Plan." *Ibid.* After stating that "the benefits may not be 'accrued' in the ERISA sense," Justice Stevens added that respondents' "right to payment is contingent only upon their election to retire after reaching age 62". *Id.* at 46a. Justice Stevens stated that he "would construe contingent rights or liabilities to include respondents' rights to early retirement benefits upon reaching age 62." *Id.* at 47a.

3. On remand, the Fourth Circuit again ruled in favor of respondents. Pet. App. 1a-32a. The court of appeals first held that the unreduced early retirement benefits at issue were not "accrued benefits" under ERISA. *Id.* at 6a-9a. The court then concluded that it was not required to decide whether the unreduced early retirement benefits at issue were "liabilities" that had to be satisfied, under Section 4044(d)(1)(A) before Mead could recoup the residual assets of the Plan. Pet. App. 9a. The court stated that it was reluctant to reach the statutory issue in light of what it viewed as the "mishmash of statutory provisions, regulations, legislative history, and actuarial lore" bearing on the issue. *Ibid.* The court concluded that there was no need to decide whether the statute required payment of unreduced benefits to respondents because, in the court's view, the terms of the Plan compelled payment. *Id.* at 11a.

In so holding, the court relied on Article XIII, Section 4(f), of the Plan. That provision, as we have noted, states that any surplus remaining in the Plan "due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan," may revert to the employer. See Pet. App. 122a. The court of appeals concluded that, for two reasons, that provision prohibited distribution of residual assets to Mead prior to payment of the unreduced early retirement benefits: "(1) the funds in the Plan that had been set-aside in expectation of fulfilling the unreduced early retirement benefits did not remain in the Plan 'due to actuarial error'; and (2) the benefits at issue are 'contingent rights' that must be paid prior to any reversion." Pet. App. 12a.

With respect to its first point, the court did not make reference to the applicable regulation, which speaks directly to the issue. Indeed, the regulation defines "erroneous actuarial computation" as "the surplus arising because actual requirements differ from expected requirements even though the latter were based upon previous actuarial valuations of liabilities * * * and were made by a person competent to make such determinations in accordance with reasonable assumptions," 26 C.F.R. 1.401-2(b)(1). Ignoring the regulation, the court instead stated that " '[a]ctuarial error' seems to reference computational error resulting from inaccurate statistical assumptions." Pet. App. 12a. Since the surplus remaining in the Mead Plan did not result from statistical inaccuracies, the court held that the surplus did not result from "actuarial error" within the meaning of the Plan. *Id.* at 13a.

With respect to the meaning of "contingent rights accrued under the Plan," the court concluded that the

unreduced benefits qualified as "contingent rights" because respondents would have had a right to unreduced benefits upon reaching age 62. Although the court had held that respondents' rights to unreduced benefits had not "accrued" because the respondents had not reached age 62 when the Plan was terminated, the court declined to read "accrued" in Article XIII, Section 4(f), of the Plan in light of its meaning in ERISA. The court stated that "[t]he Plan incorporates no such reference to Code § 411(a)(7)'s concept of 'accrued benefit,' nor does the Plan manifest an intent to effect such an incorporation." Pet. App. 14a. Accordingly, the court held that respondents' unreduced benefits were "contingent rights" that had to be satisfied before Mead could recoup any surplus. *Id.* at 15a.

Judge Chapman dissented. Pet. App. 16a-32a. Relying on a number of revenue rulings, he concluded that "contingent liabilities 'are the benefit credits *accrued* up to the time of termination of the trust.'" *Id.* at 21a. Since the court held that respondents' right to unreduced benefits had not accrued when the Plan was terminated, Judge Chapman concluded that the Plan was not statutorily required to pay unreduced benefits to respondents. He further concluded that the drafters of the Mead Plan intended "to borrow the definitions of 'contingent' and 'accrued'" from ERISA. *Id.* at 31a.

Relying on the applicable regulation, Judge Chapman stated that "the term 'erroneous actuarial computation' is simply shorthand for what is left over after all vested and contingent obligations created in the plan are satisfied." Pet. App. 24a. In his view, it is "self-evident that the term 'actuarial error' [as used in the Plan] is coterminous with the term 'erroneous actuarial computation' [as used in the regu-

lation], especially given the interchangeable use of the two terms by the IRS" in the regulation and revenue rulings. *Id.* at 30a.

Judge Chapman stated that his conclusions were supported by Congress's enactment of the Retirement Equity Act of 1984 (REA), even though the amendments wrought by REA do not apply in this case because the Plan was terminated prior to REA's effective date. See Pet. App. 10a n.3. In Section 301(a) of REA, Congress amended ERISA and the Internal Revenue Code to address the treatment of "retirement-type subsid[ies]"—like the unreduced benefit offered under the Mead Plan—in the event that a plan is terminated or amended to eliminate unreduced benefits. Congress provided that a participant in a pension plan is entitled to unreduced or subsidized benefits only if the participant "satisfies (either before or after the amendment [or termination of the plan]) the pre-amendment conditions for the subsidy." 26 U.S.C. 411(d)(6)(B); 29 U.S.C. 1054(g)(2). Because respondents "claim a right to unreduced early retirement benefits, even though they can not satisfy the conditions specified in the plan"—since they stopped working for Mead before reaching age 62—Judge Chapman concluded that they would not qualify for unreduced benefits under the statutes as amended. Pet. App. 28a. Moreover, Judge Chapman continued, respondents "seek the value of the subsidy not only for pre-termination service but also for post-termination service," even though Section 301(a) of REA provides for payment of a subsidy only for service before the plan was amended or terminated. Pet. App. 28a. Since he concluded that "Congress thought it was creating a new benefit under ERISA and the Code" through Section 301(a) of REA, Pet. App.

27a-28a, Judge Chapman found additional support for his conclusion that neither the Plan nor the statute, prior to REA's enactment, required Mead to pay unreduced benefits to respondents before recouping the surplus from the Plan.

The court of appeals denied a suggestion of rehearing en banc by a six-to-five vote. Pet. App. 62a-63a.

DISCUSSION

The issue in this case is whether the court of appeals correctly construed Article XIII, Section 4(f), of the Mead Plan to require payment of unreduced early retirement benefits to respondents. In our view, the court of appeals was wrong. The court's basic error was that it concluded that the Plan provision at issue was not meant to track the relevant regulation. The court should have concluded, as did Judge Chapman, that the drafters of the Plan meant to fulfill their requirements under the statutes and the regulation, but did not intend to provide rights upon termination beyond those required by law. In light of that conclusion, the court should have determined, as did Judge Chapman, that unreduced early retirement benefits were not liabilities of the Plan that had to be paid to employees who had not fulfilled the conditions set out in the Plan for obtaining such benefits.

We do not believe, however, that review by this Court is warranted. The Retirement Equity Act of 1984 makes clear how unreduced early retirement benefits are to be treated under the statutes. A court facing a similar case arising out of a termination that occurred after July 30, 1984, will not face a "mishmash of statutory provisions, regulations, legislative history, and actuarial lore," as the court of appeals perceived the pre-1984 situation. Pet. App. 9a. In-

stead, it would understand, as Section 301(a) of REA provides, that employees are entitled to unreduced benefits that accrued prior to a plan's termination if, but only if, they ultimately fulfill the plan's requirements for obtaining unreduced benefits. In our view, a court that understands the statutory framework would likely conclude that plan language such as the language at issue here was meant to adopt the rule required by statute. The possibility that a court, in a case arising after 1984, would conclude that plan language like that in the Mead Plan provides benefits in excess of those mandated by Congress seems sufficiently unlikely to require review at this time.

1. Article XIII, Section 4(f), of the Mead Plan stated that the employer would recover "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan." Pet. App. 122a. As Judge Chapman correctly stated with respect to the meaning of "actuarial error," the majority simply ignored "the term's obvious origin in Treas. Reg. § 1.401-2(b)." *Id.* at 30a. That regulation explains that a surplus due to "erroneous actuarial computations"—a phrase that does not appear in the relevant statutory provisions, but only in the regulation—is not limited to situations where it is shown that an actuary made some sort of computational error in calculating funding requirements. Rather, the regulation provides that "[a] balance due to an 'erroneous actuarial computation' is the surplus arising because actual requirements differ from expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent

to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding." Section 1.401-2(b) further provides that "the trust instrument must contain a definite affirmative provision" stating in effect that the employer cannot "recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." Accordingly, the Mead Plan was required by the regulation to include a provision such as Article XIII, Section 4(f).

Although a pension plan may provide rights in excess of those required by law, we agree with Judge Chapman that, by referring to "actuarial error," the drafters of the Mead Plan presumably meant to incorporate the concept of "erroneous actuarial computation" set forth in the regulation. IRS's rulings interpreting Section 1.401-2(b)(2) have consistently used the phrase "actuarial error" as one synonymous with the phrase "erroneous actuarial computations." See Rev. Rul. 83-52, 1983-1 C.B. 87; Rev. Rul. 71-152, 1971-1 C.B. 127; Rev. Rul. 69-421, 1969-2 C.B. 59, 69; Rev. Rul. 65-178, 1965-2 C.B. 94, 110; Rev. Rul. 61-157, 1961-2 C.B. 67, 79; Rev. Rul. 57-163, 1957-1 C.B. 128, 138; Rev. Rul. 53-33, 1953-1 C.B. 267, 273. Other courts of appeals have correctly recognized that similar plan language was meant to track the language of the regulation, rather than provide additional rights. *International Union, UAW* v. *Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984) (IRS definition used in interpreting "surplus attributable to actuarial error"); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 (11th Cir. 1988) (IRS definition used as guide to interpreting

"actuarial error"). There is simply no reason to think that "actuarial error" was intended to have a meaning different from "erroneous actuarial computation."

The court of appeals similarly misread the language in Article XIII, Section 4(f), requiring satisfaction of the "contingent rights accrued under the Plan" before any surplus was recouped by Mead. The court of appeals recognized that this phrase was "written in light of" the regulation. Pet. App. 14a. However, the court failed to appreciate the significance of IRS's long-standing administrative construction of Section 1.401-2. Since 1953, IRS consistently has interpreted "contingent obligations" (the regulation's counterpart to the Plan term "contingent rights") as "the benefit credits accrued up to the time of the termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." Rev. Rul. 71-152, 1971-1 C.B. 127, revoked on other grounds, Rev. Rul. 83-52, 1983-1 C.B. 87; Rev. Rul. 69-421, 1969-2 C.B. 59, 69; Rev. Rul. 65-178, 1965-2 C.B. 94, 110; Rev. Rul. 61-157, 1961-2 C.B. 67, 79; Rev. Rul. 57-163, 1957-1 C.B. 128, 138; Rev. Rul. 53-33, 1953-1 C.B. 267, 273. Since the court of appeals agreed with petitioner's claim that the unreduced early retirement benefits at issue did not constitute "accrued benefits," Pet. App. 6a-9a, it should not have treated those benefits as "contingent obligations" under Section 1.401-2 or as "contingent rights accrued" under the parallel language of the Plan. Again, it seems clear that the language of the Mead Plan was meant to fulfill the Plan's obligation under the regulation to state that recoupment by the employer was not permissible except under the circumstances provided by law, not to provide additional rights to participants in the Plan.

2. Petitioner contends, Pet. 11-23, that the decision below conflicts with the decisions of five other circuits: *May* v. *Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988); *International Union, UAW* v. *Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); *Nobers* v. *Crucible Inc., 1975 Salaried Retirement Plan*, No. 90-3463 (3d Cir. Jan. 1991) (unpublished opinion); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), aff'd without opinion, 729 F.2d 863 (D.C. Cir. 1984); *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1273 (3d Cir. 1978).

We discern no square conflict. Rather, the court of appeals in this case addressed a narrow issue: whether Mead was precluded from recouping plan assets because the terms of the Plan at issue did not provide for distribution of the Plan assets to the employer prior to the payment of unreduced early retirement benefits. Pet. App. 11a-16a. Although each of the cases cited by petitioner involved a challenge to a reversion upon termination of a pension plan, none addressed the precise issue decided in this case. In fact, only *Nobers*—which was resolved by an unpublished opinion—involved unreduced early retirement benefits.[3] And in *Nobers* the issue was whether

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[3] In *May* and *Blessitt*, employees sought to recover an unaccrued normal retirement benefit, not an unreduced early retirement benefit. Similarly, in *Dyneer Corp.*, a union sought to prevent the reversion of all surplus; the union did not rely on a provision specifically addressed to unreduced carly retirement benefits. The issues in *Washington-Baltimore Newspaper Guild Local 35* and *In re C.D. Moyer Co. Trust Fund* centered on whether a disputed amendment to a plan could be given effect.

unreduced benefits constituted "liabilities of the plan" within the meaning of Section 4044(d)(1)(A) of ERISA. In the instant case, the court of appeals left that question open and based its decision on the terms of the Plan.

We nonetheless agree that the Fourth Circuit's approach is contrary to that used by other circuits. In particular, unlike other courts, the Fourth Circuit gave little or no deference to the views of IRS and the PBGC in interpreting plan terms that satisfied requirements imposed by law. The inconsistency is most evident with respect to the court's interpretation of "actuarial error" in the Mead Plan, since the court of appeals ignored Section 1.401-2(b) and the IRS's revenue rulings applying the regulation, while other courts of appeals have deferred to IRS in interpreting plans containing the term "actuarial error." See *Dyneer Corp.*, 747 F.2d at 337; *Blessitt*, 848 F.2d at 1170.[4]

3. Although the court of appeals' analysis is flawed, we believe that review by this Court is not warranted at this time. The primary reason for our view is Congress's enactment of the Retirement Equity Act of 1984. In light of that amendment to ERISA, which addressed how unreduced benefits are to be treated in the event of plan termination or an amendment that eliminates unreduced benefits, the statutory question that the court of appeals did not address—whether the unreduced benefits were "liabilities" that the Plan had to satisfy under Section 4044(d)(1)(A) before a reversion is allowed—affects only those plans

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[4] Moreover, while *Blessitt* involved normal retirement benefits rather than unreduced benefits, the Eleventh Circuit, unlike the court in this case, correctly held that the plan did not have to provide benefits that had not been earned. 848 F.2d at 1179.

that were terminated or amended as of July 30, 1984. See Section 302(d)(1) of REA, 98 Stat. 1452. In our view, respondents are correct in suggesting, Br. in Opp. 17, that most claims based on events occurring before that date should now be time-barred.

Under REA, the statutory requirements in a case such as this are now clear: persons such as respondents would be entitled to the actuarial value of the unreduced benefits they earned prior to the termination if they eventually satisfied the conditions for obtaining the benefits. See 26 U.S.C. 411(d)(6)(B) and 29 U.S.C. 1054(g)(2); Rev. Rul. 85-6, 1985-1 C.B. 133; Pet. App. 28a. Since a pension plan's "liabilities" under the statute with respect to unreduced benefits are now clear, we think it likely that courts will construe plan language that fulfills the requirement of Section 1.401-2 as doing just that, not as granting additional rights.[5] In other words, the court of appeals in this case turned to the language of the Plan only after concluding that the requirements of the statute were unclear—indeed, that the pre-1984 situation was a "mishmash." Pet. App. 9a. It accordingly read the language of the Plan in isolation. A court addressing a case arising after July 30, 1984, would more naturally read language like that set forth in the Mead Plan in light of the pertinent legal requirements, which now have been clarified, and

---

[5] A pension plan could make that result clear beyond peradventure by stating that the plan provision regarding distributions upon termination is intended solely to fulfill the plan's requirements under Section 1.401-2(b), and not to grant participants any rights beyond those provided by law. The Mead Plan did not so state, but instead provided generally that Plan provisions "in conflict" with the requirements of law "shall be deemed to be null and void." Pet. App. 125a. (Art. XV, § 4).

would likely conclude that such language was intended to track the regulation.

It remains possible, even after REA, that a court might construe plan language like that of the Mead Plan to provide rights greater than those provided by statute. And such a result would be of significance if, like the court below, courts construed references to surplus resulting from "actuarial error" to mean something other than surplus resulting from an "erroneous actuarial computation," since so many plans use the terms interchangeably. See Br. of Amici Curiae American Academy of Actuaries and American Society of Pension Actuaries at 15-17. However, the Treasury Department has initiated a regulation project, and it is anticipated that the regulations resulting from this project will address the meaning of "acturial error." Those regulations are also expected to address the meaning of "contingent liabilities." Accordingly, the regulations should provide further guidance regarding the issues presented in this case.

Finally, petitioner overstates the consequences that this case has for the PBGC. According to petitioner, "[r]elying on § 4003(f) [of ERISA], plan participants who did not receive unearned early retirement subsidies in plan terminations approved by the PBGC could seek to recover those benefits directly from the agency or to require it to initiate costly proceedings to recover reverted assets from sponsoring employers." Pet. 26. Petitioner appears to believe that the PBGC might be directly liable because it issued "notices of sufficiency" with respect to the terminations. But the PBGC's notices of sufficiency applied only to the first four priority categories of benefits listed under Section 4044(a) of ERISA, and therefore did

not warrant that plan assets were sufficient to pay unreduced benefits (which would qualify, if at all, under the fifth or sixth categories). Moreover, under the procedures resulting from enactment of the Single-Employer Pension Plan Amendments Act of 1986, Tit. XI, Pub. L. No. 99-272, 100 Stat. 237, the PBGC no longer issues notices of sufficiency. And while the PBGC is authorized by Section 4003(e)(1) of ERISA, 29 U.S.C. 1303(e)(1), to bring an action to require reallocation of assets that have improperly reverted to the employer, a private litigant has no right to compel the PBGC to bring such an action. Furthermore, the six-year statute of limitations of Section 4003(f)(5)(A)(i) would bar most, if not all, such litigation. In short, review is not warranted on account of possible adverse effects of the decision below on the PBGC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

APPENDIX

1. Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1), as amended, provides in pertinent part:

> any residual assets of a single-employer plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

2. Section 401(a) of the Internal Revenue Code, 26 U.S.C. 401(a), as amended, provides in pertinent part:

> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * * * *
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.

3. Section 301(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1450-1451, amended 26 U.S.C. 411(d)(6) and Section 204(g) of ERISA, 29 U.S.C. 1054(g), so that each provides in pertinent part:

> a plan amendment which has the effect of * * *
>
> > eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) * * *
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy.

4. A Treasury Regulation, 26 C.F.R. 1.401-2(b), provides in pertinent part:

> (1) The intent and purpose in Section 401 (a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the

plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding.

* * * * *

(2) The term "liabilities" as used in section 401(a)(2) includes both fixed and contingent obligations to employees. * * * It must be impossible for the employer (or other non-employee) to recover any amounts other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect.

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Respondents.

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PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

ARGUMENT

In response to this Court's invitation, the Solicitor General submitted a Brief for the United States As Amicus Curiae on May 28, 1992. As the Solicitor General's submission makes clear, the United States—and more specifically, the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service ("IRS")—agrees with petitioner The Mead Corporation ("Mead"): (1) that the construction of federal pension law provisions adopted by "the court of appeals was wrong" (SG Br. 10); (2) that, with respect to interpreting "contingent liabilities" under Internal Revenue Code ("Code") § 401 (a) (2), "the Fourth Circuit's approach is contrary to that used by other circuits" (SG Br. 15); (3) that, with respect to interpreting the other pension law provision at issue here—"actuarial error" under Code § 401(a) (2)

and Treas. Reg. § 1.401-2(b)—there is a square conflict in the circuits (SG Br. 12, 15); and (4) that it "would be of significance" if the Fourth Circuit or other courts followed in the future the Fourth Circuit's approach to either the "contingent liabilities" or "actuarial error" provisions (SG Br. 17). In disagreement with Mead, however, the Solicitor General suggests that review is not warranted because the meaning of the "contingent liabilities" and "actuarial error" provisions either was clarified by the enactment of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), or will be clarified by an unspecified "regulation project" that the Solicitor General indicates has been "initiated" by the IRS. (SG Br. 15-17)

Mead is at a loss to understand the Solicitor General's position, which conflicts directly with the PBGC's statements to the Fourth Circuit in urging rehearing en banc. (*See* PBGC Br. In Support Of Rehearing (reprinted at Pet. App. 178a-190a)) In all events, neither the enactment of REA nor this previously-undisclosed regulatory effort justifies denying review of a decision that the Solicitor General concedes is wrong, in conflict with other courts of appeals and the views of the responsible administrative agencies, and potentially destructive of the sound administration of our nation's pension system.[1]

I. REA DID NOT CLARIFY THE PENSION LAW PROVISIONS MISCONSTRUED BY THE DECISION BELOW AND DOES NOT ELIMINATE THE NEED FOR REVIEW BY THIS COURT

The Solicitor General's "primary reason" for suggesting that review is not warranted "is Congress's enactment of [REA]." (SG Br. 15) As the Solocitor General sees it (SG Br. 15-16), REA will ensure that courts in the fu-

[1] Indeed, in light of the Solicitor General's full endorsement (SG Br. 10-12) of the analysis in Judge Chapman's lengthy dissent (Pet. App. 16a-32a), it may be appropriate for this Court to summarily reverse the decision below on the basis of that dissent.

ture will construe pension law terms of art incorporated in pension plans in a manner consistent with the established meaning of those terms under ERISA and the Code. This reasoning is simply incorrect.

First, REA is hardly a new development. The statute dates from 1984, and was fully in place even before the Fourth Circuit's and this Court's initial decisions in this case. Far from believing that REA drained this case of significance, this Court commented—three years *after* REA's enactment—that the questions it remanded for decision in this case presented "complicated and important issues pertaining to the private pensions of millions of workers." (Pet. App. 44a n.11) On remand to the Fourth Circuit, the parties' briefs analyzed REA in detail, and REA's impact on the legal analysis of the issues in the case was fully discussed at oral argument. REA was cited by the panel majority (Pet. App. 10a n.3), and, as the Solicitor General himself notes (SG Br. 9), was discussed in detail in Judge Chapman's dissent (Pet. App. 27a-29a). But the Solicitor General's prediction (SG Br. 16) is belied by the fact that REA's existence hardly "clarified" matters here. The panel split 2-1, and, far from "clarifying" the issues, REA served only as an additional source of disagreement. The panel majority viewed REA as a "complication" (Pet. App. 10a n.3), not the type of "clarification" that the Solicitor General suggests; while Judge Chapman's lengthy and carefully-reasoned dissent concluded that REA "confirms" that Mead's construction of the pension law provisions at issue is correct (Pet. App. 27a). The entire Fourth Circuit similarly was deeply divided on the issues presented in this case, and denied Mead's petition for rehearing en banc by a 6-5 vote. (Pet. App. 62a-63a) There is no reason to believe that REA will "clarify" matters for other courts of appeals any more than it has for the Fourth Circuit.

Second, in suggesting (SG Br. 15-17) that REA's enactment obviates the need for review because it "makes

clear how unreduced early retirement benefits are to be treated," the Solicitor General has confused two entirely different statutory provisions. REA amended Code § 411 (d) (6) to provide that plan participants are entitled to receive unearned early retirement benefits if they eventually satisfy the plan's conditions. This amendment to Code § 411(d) (6) cannot ensure that courts in the future properly will construe "contingent liabilities" and "actuarial error," for those provisions derive from entirely different statutory and regulatory provisions—Code § 401 (a) (2) and Treas. Reg. § 1.401-2(b).

As the Solicitor General recognizes (SG Br. 11-13, 16-17), the decision below construed "contingent liabilities" under Code § 401(a) (2) so as to provide considerably more generous relief than that available under Code § 411(d) (6). The clarity of the more limited Code § 411(d) (6) remedy does nothing to narrow the Fourth Circuit's erroneous construction of Code § 401(a) (2). The Solicitor General's suggestion (SG Br. 16) that REA will induce future plaintiffs not to rely on that construction of Code § 401(a) (2) and seek the broader relief it makes available is surely a vain and empty hope.

In any event, REA has no possible role to play in clarifying the correct meaning of the other pension law provision at issue here—"actuarial error." The amendments to Code § 411(d) (6) implemented by REA do not even tangentially address the "actuarial error" concept. Indeed, revenue rulings both before and after REA's enactment use identical language to explain the meaning of "actuarial error" under Treas. Reg. § 1.401-2(b); Revenue Ruling 83-52 and Revenue Ruling 85-6 both provide that "[a]fter satisfaction of [fixed and contingent] liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error." Rev. Rul. 83-52, 1983-1 C.B. 87, 87 (Pet. App. 75a); Rev. Rul. 85-6, 1985-1 C.B. 133, 134. Thus, REA has done nothing to "clarify" "actuarial error," and the court

of appeals' decision to give that term a meaning that the Solicitor General acknowledges (SG Br. 12, 15) is at odds with the "IRS's rulings" and "[o]ther courts of appeals," demands review by this Court.

Third, as the Solicitor General pointed out (SG Br. 15), the fundamental error in the decision below is that it "ignored" agency regulations and revenue rulings, rather than "defer[] to [the] IRS in interpreting plans." Given the nature of this mistake, it is difficult to comprehend the logic of the Solicitor General's prediction (SG Br. 15-17) that the amendment of Code § 411(d)(6) by REA will lead courts in the future to defer to agency interpretations of "contingent liabilities" and "actuarial error" under Code § 401(a)(2) and Treas. Reg. § 1-401-2(b). Indeed, by focusing on the structural problems with the decision below, the Solicitor General has recognized that the error in this case is more fundamental than the proper interpretation of "contingent liabilities" and "actuarial error." The Fourth Circuit has failed completely to heed this Court's instructions (Pet. App. 43a) in remanding this case to "consider the views of the PBGC and the IRS." Thus, review is necessary to confirm the correct interpretative approach: courts must construe pension law terms incorporated into pension plans by reference to the ERISA and Code provisions from which those terms are derived and by granting deference to agency interpretations of those statutory provisions. *See generally Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

Finally, in pointing to REA as a panacea, the Solicitor General has overlooked the fact that many pre-REA pension plan terminations remain subject to challenge. The Solicitor General asserts (SG Br. 16) that most pre-REA claims "should now be time-barred." But while the Solicitor General makes this assertion by way of endorsing the respondents' analysis (SG Br. 16), he apparently has ignored respondents' own calculations that claims are not yet time barred in eight states spanning seven judicial

circuits (including, significantly, the Fourth Circuit): Rhode Island from the First Circuit; West Virginia from the Fourth Circuit; Louisiana from the Fifth Circuit; Kentucky and Ohio from the Sixth Circuit; Illinois from the Seventh Circuit; Montana from the Ninth Circuit; and Wyoming from the Tenth Circuit. (*See* Opp. App. 5a-7a).

Moreover, the Solicitor General's reliance on a time bar as a reason to deny review reflects a basic misunderstanding of pension plan terminations and the claims that arise from those terminations. The Solicitor General views plan termination as taking place at a single point in time and assumes that the termination itself is the only possible event that could trigger the limitations period. In reality, it generally takes a substantial period of time after plan termination to calculate the proper benefit payments and to begin making those payments. In addition, post-termination pension payments to participants may begin decades in the future and often stretch out over many years. In such situations, participants (or their beneficiaries) may attempt to argue that the limitations period runs, not from the date of the plan termination, but from the receipt of allegedly insufficient benefits. Indeed, there is a line of cases adopting just such a view, holding that a new cause of action arises for purposes of the statute of limitations every time a benefit check is issued to a participant. *See Meagher v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 856 F.2d 1418, 1422-23 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989).

Thus, a substantial probability remains that the decision below—which, after all, creates substantial incentives for plan participants to raise claims—will have a broad impact. Likewise, the decision below is likely to lead to results that differ solely due to the forum selected for these claims, since, as the Solicitor General recognized (SG Br. 15), the approach that the Fourth Circuit applies "is contrary to that used by other circuits."

II. THE EXISTENCE OF AN UNSPECIFIED "REGULATION PROJECT" DOES NOT ELIMINATE THE NEED FOR REVIEW BY THIS COURT

Ultimately, even the Solicitor General recognizes that REA does not eliminate the need for review in this case. Rather, the Solicitor General reports (SG Br. 17) that, "even after REA," a court may misconstrue the pension law terms at issue here by failing, like the court below, to read them in light of the underlying statutory and regulatory framework—a result that the Solicitor General concedes (SG Br. 17) would be "of significance . . . since so many plans use the terms." Thus, the Solicitor General's "primary reason" (SG Br. 15) to deny review collapses and, in its place, all the Solicitor General can offer (SG Br. 17) is an oblique reference to a "regulation project" that has been "initiated" by the IRS. This feeble response fails to demonstrate why review of an erroneous decision that has created a conflict in the circuits on a question of national importance is not appropriate.

First, any regulation that the IRS now adopted likely could have only prospective application. As this Court noted in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988), "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Congress has not done so here, and thus the "regulation project" pointed to by the Solicitor General is fundamentally unable to "provide further guidance" for any plan termination taking place prior to the regulation's final adoption.

Second, the "regulation project" disclosed by the Solicitor General has never previously been publicly announced.[2] It thus clearly is in its very infancy (despite

[2] The IRS releases periodic reports identifying all regulatory projects. In none of those reports, from 1984 to the most recent

the fact that the panel issued its opinion in this case well over a year ago). Any regulations that the IRS develops must go through the prescribed notice and comment process before they could even conceivably address "the issues presented in this case." (SG Br. 17). Even in normal circumstances, such regulatory projects take years to complete; the IRS regulations implementing REA, for example, were finally adopted four years after the statute was enacted. *See* 53 Fed. Reg. 26,050 (July 11, 1988).

Moreover, in the present environment there is substantial reason to doubt that this "regulation project" will be able to move forward at all. The Administration recently has announced plans to curtail new regulatory programs (presumably including the one pointed to by the Solicitor General), established new guidelines that must be met before regulations can be issued, and implemented a series of general moratoriums on regulations.[3] In this context, the Solicitor General's expectation (SG Br. 17) that the regulations, if any, that eventually result from the IRS's new project "should provide further guidance" is cold comfort to Mead and other pension plan administrators and actuaries who must grapple—immediately and on a daily basis—with the uncertainty created by the decision below.

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report in April 1992, has the IRS identified a regulatory project on "contingent liabilities" or "actuarial error" under Code § 401(a)(2) and Treas. Reg. § 1.401-2(b). *See, e.g.*, Daily Tax Rep. (BNA), Rep. No. 84 (Apr. 30, 1992) (reprinting Report By Office Of Chief Counsel, Internal Revenue Service On Regulations Projects Status And Disposition As Of March 31, 1992; no listing of the regulation project referred to by the Solicitor General).

[3] *See* Memorandum on Reducing the Burden of Government Regulation—January 28, 1992, 28 Weekly Comp. Pres. Doc. 232-34 (Feb. 17, 1992) (90-day moratorium); Memorandum on Implementing Regulatory Reforms—April 29, 1992, 28 Weekly Comp. Pres. Doc. 728-29 (May 4, 1992) (120-day moratorium).

Finally, the Solicitor General's conclusion (SG Br. 17) that review is unnecessary because new IRS regulations will clarify the meaning of "contingent liabilities" and "actuarial error" is, to say the least, highly paradoxical in light of the Solicitor General's earlier acknowledgment (SG Br. 12-13) that an elaborate framework of existing regulations and revenue rulings *already* have clearly established the proper meaning of both terms. Indeed, the Solicitor General agrees (SG Br. 13, 15) that the Fourth Circuit's fundamental error was its failure even to consider the "IRS's long-standing administrative construction" of the relevant provisions. In essence, then, the Solicitor General is suggesting that review is not necessary because new regulations may at some point in the future clarify something that the PBGC, the IRS, "[o]ther courts of appeals" (SG Br. 12), and the Solicitor General himself already consider to be crystal clear. Such a suggestion is not a sufficient or appropriate basis for denying review of a concededly erroneous decision that has created a conflict on an issue crucial to pension plan administration.

Left uncorrected, the Fourth Circuit's decision requires Mead to make substantial payments of unearned early retirement benefits that the agencies and the Solicitor General agree (SG Br. 11-13) Mead has no obligation to make. To prevent such an inappropriate and unjust result, this Court should grant certiorari. Alternatively, since the Solicitor General, speaking for both the PBGC and the IRS, has adopted the analysis of Judge Chapman's dissent, the decision below should be summarily reversed on the basis of that dissent.

CONCLUSION

For the foregoing reasons and those set forth in Mead's petition and reply memorandum, the Court should grant certiorari or summarily reverse.

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Dated: June 2, 1992

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF ACTUARIES AND AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF ACTUARIES AND AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONER

Pursuant to Rule 21 of the Rules of the Supreme Court, the American Academy of Actuaries and the American Society of Pension Actuaries move this Court for an Order permitting them to file the attached Supplemental Amici Curiae Brief in Support of Petitioner, 40 copies of which are submitted concurrently with this motion. This motion is based on the following grounds:

1. Both the American Academy of Actuaries ("the Academy") and the American Society of Pension Actuaries ("ASPA") have a strong interest in this litigation and are directly affected by the decision of the Fourth Circuit entered on June 12, 1991. The Academy is a pro-

fessional organization of actuaries whose current membership exceeds 10,000 professional actuaries. Its primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice. ASPA is a non-profit organization of more than 3,000 persons engaged in the design and administration of retirement plans, and in providing both actuarial and consulting services with respect to such plans. Its membership includes enrolled actuaries, certified pension consultants, plan administrators, attorneys and others concerned with the private pension system.

2. Both the Academy and ASPA participated as amici in the proceedings in this action before the Fourth Circuit and both participated as amici in the initial proceedings before this Court.

3. In the Brief of the United States as Amicus Curiae, the Solicitor General predicts that the decision below, while erroneous, will not have any serious impact on the administration of pension plans. As representatives of individuals who will have to cope daily with considerable uncertainties about plan design, plan funding, and plan administration generated by the Fourth Circuit's decision, the amici are qualified to comment on the Solicitor General's prediction by bringing to the attention of this Court relevant matter that has not been submitted by the parties.

4. Pursuant to Rule 37.2 of the Rules of the Supreme Court, counsel for Petitioner and Respondents have consented to the filings of amicus curiae briefs by any interested party. The original of said consent was filed in the Supreme Court November 1, 1991.

Accordingly, the Academy and ASPA respectfully request that their Motion for Leave to File Supplemental Brief in Support of the Petitioner be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-356

THE MEAD CORPORATION,
Petitioner,
v.
B. E. TILLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF ACTUARIES AND AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONER

ARGUMENT

The American Academy of Actuaries ("AAA") and the American Society of Pension Actuaries ("ASPA") agree with the Supplemental Memorandum filed today by Petitioner, The Mead Corporation, discussing the Brief of the United States filed by the Solicitor General ("Solicitor General's Brief"). As amici who have participated throughout this case, we submit several additional points on behalf of the over 13,000 actuaries and pension practitioners within our respective memberships. Those individuals will have to cope daily with considerable uncertainties about plan design, plan funding, and plan administration if the Fourth Circuit's decision—which the

Solicitor General concedes is wrong—is not reversed by this Court.

We cannot agree with the Solicitor General's suggestion that certiorari should be denied because "The Retirement Equity Act of 1984 makes clear how unreduced early retirement benefits are being treated under the statutes." (S.G.'s Br. at 10.) The decision below, holding that unreduced early retirement benefits are payable upon plan termination—whether or not earned—presently creates an intolerable dilemma. As we have previously asked, for plans terminating now, are unreduced early retirement benefits (1) payable to employees who have not earned them because they constitute "contingent liabilities" under Code Section 401(a)(2), or (2) payable as REA provides—only if and when the participant later retires after having met the eligibility requirements for the benefit in accordance with Code Section 411(a)(6)?

Further, the Solicitor General's prediction that the Fourth Circuit's decision will be ignored and the REA rules will prevail in future cases brought by participants relying on the decision below is not a sufficient basis for this Court to deny review now. The consequences to the soundness of the U.S. pension system are too great to risk the very real possibility that courts, in attempting to harmonize the REA rules with the lower court's decision, will reach erroneous or inconsistent results.

Aside from the problems the court below's approach to "contingent liabilities" have created, its decision that "actuarial error"—the basis upon which all reversions rest—is limited only to those instances where an actuary has made a mistake calls into question the correctness of all benefit calculations in all terminated plans and the propriety of virtually all reversions, past as well as future. The Solicitor General's comment that decisions following the one below would be "of significance" (S.G.'s Brief at 17) considerably understates the potential adverse consequences of such decisions. We believe that such decisions will jeopardize the integrity of actuarial calcu-

lations for pensions plans throughout the United States. Further, as representatives of the body of individuals upon whom the job of benefit and reversion re-calculations would fall, we can say that the task would be staggering.

We are at a loss to understand what regulation project could possibly be necessary to clarify what the agencies and the Solicitor General agree has been clear for years: "actuarial error" is the difference between a terminating plan's assets and liabilities and represents the amount which may revert to the employer. It has always been understood that actuarial assumptions will diverge—at least to some degree—from future plan experience. Thus, although actuarial calculations are performed correctly, surplus funds will arise from "actuarial error", and not from a statistical (or any other) error by an actuary.

Finally, by redefining "actuarial error", the Fourth Circuit's decision sends an extremely undesirable message to employers that generous funding of pension plans will be punished. Indeed, it is not overreaching to say that the incorrect principles advanced by the Fourth Circuit below strike at the very heart of the private pension system. As the PBGC said in its amicus brief urging this Court to grant certiorari initially:

> ". . . the decision of the Fourth Circuit penalizes employers that overfund their defined benefit plans, out of an abundance of caution or as a result of actuarial error, by imposing substantial unanticipated liabilities for benefits never promised to their employees. To avoid these liabilities, employers may decide not to establish new defined benefit pension plans. Congress, however, intended to encourage the continuation and maintenance of voluntary defined benefit pension plans for the benefit of their participants. 29 U.S.C. § 1302(a)(1). Contrary to this intent, the Fourth Circuit's decision induces employers to fund their existing defined benefit pension plans to the minimal extent permitted by law. Such funding practices are inimical to the long-term in-

> terests of the millions of plan participants and beneficiaries that ERISA was enacted to protect, and to the PBGC's interest in maintaining a viable pension insurance program." Brief for the Pension Benefit Guaranty Corporation as Amicus Curiae in Support of The Mead Corporation's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987) at 4.

The legislative and regulatory atmosphere in which the private pension system operates is extremely complex. Employers, actuaries, plan administrators, and participants themselves must be able to depend upon the judicial system to uphold the rules that govern it. In this case all but the Respondents agree that the judicial system has failed in that task, and now is the time to correct that failure. To do otherwise is to threaten the stability of the pension system itself.

We urge the Court to grant the petition for certiorari.

Respectfully submitted,

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(10)

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OPPOSITION TO MOTION OF AMICI CURIAE TO FILE SUPPLEMENTAL BRIEF

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COME NOW respondents in the above captioned proceeding and respectfully request that the Court deny the Motion Of Amici Curiae For Leave To File A Supplemental Brief in support of the Petition for Certiorari. In support of their request, respondents show as follows:

1. Out of an overdeveloped sense of sportsmanship, respondents reluctantly agreed that Amici Curiae might file *a* Brief In Support Of The Petition For Certiorari in this proceeding.

2. Rule 15 of the Rules of the Supreme Court of the United States provides that only a party may file a Supplemental Brief. Rule 37 further provides that "a brief of an *Amicus Curiae* . . . may only be filed if submitted within the time allowed for filing a brief in opposition to the Petition for a Writ of Certiorari . . . ".

3. As *Amici Curiae* know full well, Respondents neither intended to nor did consent to their assuming the posture of a litigant in this proceeding and filing yet another brief. Amicis' statement to the effect that we consented to their filing a Supplemental Brief is at best overreaching.

4. This Court requested the Solicitor General's views and they, together with the voluminous pleadings previously filed, fully, if not fulsomely, inform the Court of the considerations bearing upon the petition. There is no need for further briefing.

WHEREFORE respondents respectfully request that the motion of Amici Curiae To File A Supplemental Brief be denied.

Respectfully submitted,

B.E. Tilley, et al.

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